

CASES  
ARGUED AND DETERMINED  
BY THE  
SUPREME COURT  
OF  
The State of Missouri  
AT THE  
OCTOBER TERM, 1883.

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LASH, *Appellant*, v. PARLIN.

**Statute of Frauds: INCOMPLETE MEMORANDUM OF CONTRACT: PAROL EVIDENCE.** A memorandum offered in evidence was as follows:

"MESSRS. PARLIN & ORENDORFF:

*Gentlemen:* Please execute the following order for plows, cultivators, \* \* \* etc., to be delivered on board cars in Chillicothe, Missouri, marked for J. F. Lash

QUANTITY.	OLD GROUND PLOWS, IRON-BEAM.	PRICE.
2. No. 6. 14-inch cut, medium steel landside.....		\$22 00

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3. No 7. Extra. 16-inch cut, medium steel landside, three-horse..... 22 00  
(and other items of plows in detail.)

## CULTIVATORS.

50. Iron-beam, Parlin's patent, with shields..... 14 50  
19. Wood-beam, Parlin's patent, with shields..... 13 50

For which I agree to give you my notes payable with exchange, or by express, prepaid, at above list, for plows—less forty-five per cent, and payable all January 1st, 1879, with ten per cent interest. Cultivators, less net per cent, and payable January 1st, 1879, with ten per cent interest.

PARLIN &amp; ORENDORFF,

Per TAYLOR."

*Held*, that though not a complete and perfect contract, this was a sufficient memorandum of a contract between J. F. Lash and Parlin & Orendorff, so as to be admissible in evidence in an action by the former against the latter; and that parol evidence was admissible to explain and apply it to the contract actually existing between the parties.

When a written memorandum of a contract does not purport to be a complete expression of the entire contract or part of it only is reduced to writing, the matter thus omitted may be supplied by parol evidence.

*Appeal from Putnam Circuit Court.*—HON. ANDREW ELLISON,  
Judge.

REVERSED.

*A. W. Mullins* for appellant.

*Chas. L. Dobson* for respondents.

WINSLOW, C.—This is an action for the breach of a certain contract, or memorandum in writing, alleged to have been executed by respondents to appellant, a copy of which will be found set out in the opinion, where it has been placed for greater convenience of reference. The petition alleges in substance, that plaintiff was engaged as a dealer in agricultural implements, lumber, etc., at Linneus, Missouri; that defendants were partners engaged in the manufacture of agricultural implements at Canton, Illinois, and



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in selling their manufactured goods; that on February 22nd, 1878, plaintiff purchased of defendants goods of their manufacture amounting to \$1,131.11; that defendants agreed to deliver said goods, within a reasonable time on board the cars, on the Hannibal & St. Joseph Railroad, at Chillicothe, Missouri, at which place they were then stored; that defendants' agent, at the request of plaintiff, assorted said goods into three lots, one to be shipped to Meadville, one to Linneus and the other to Browning, all in said Linn county; that the said agent, after having so separated and divided said plows and cultivators, boxed up and marked the lot of said goods to be shipped to Meadville, directing the same to B. L. Barbee, at that place, and made arrangements for the shipment of all of said goods; that defendants failed and refused to comply with said contract, but on the contrary, sold and delivered the goods to other parties, without the consent of plaintiff; and that plaintiff is and always has been ready to comply with the terms of said contract.

The answer after admitting the partnership, and denying generally all the other allegations of the petition, states that there was no money or other valuable thing paid as earnest to bind the pretended bargain set out in plaintiff's petition, or in part payment thereon; nor did the buyer accept any part of said goods or actually receive the same; nor was there any note or memorandum of said pretended bargain in writing, made at the time alleged, or subsequently, and signed by the defendants or any person or persons to be charged with such contract or their agents lawfully authorized—to which there was a reply putting the new matter in issue.

On the trial the plaintiff offered an abundance of evidence to prove the allegations of his petition, some portions of which the court admitted and others rejected. It seems that the negotiations began between one Taylor, as the agent of defendants, and plaintiff at Linneus, and were concluded by Taylor and one Coons as the agent of plaintiff

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at Chillicothe, where the goods were stored, and that, after everything had been completed, Taylor gave Coons the memorandum sued on to hand to plaintiff to show what the contract was. The memorandum, the original of which is on file with the record here, was executed on a large general printed blank of defendants containing a list of all their goods, which they seem to have furnished their agents for taking orders. There was evidence tending to show a delivery; but both parties seem to have abandoned all other points in the case except the sufficiency of the memorandum, and nothing else need be noticed in the case. When the memorandum was offered in evidence, it was objected to by defendants and excluded by the court, for the following reasons, to which plaintiff duly excepted: (1) That the instrument is wholly unintelligible, and is insufficient in law to take the case out of the statute; (2) That it is void for uncertainty; and (3) That it is not a note or memorandum of the "bargain" or "contract" set out in the petition, within the meaning of the statute against frauds and perjuries, and is otherwise insufficient, incompetent and irrelevant. At the conclusion of the plaintiff's evidence, defendants offered and the court sustained a demurrer to the evidence; whereupon the plaintiff took a non-suit, and now brings the case here by appeal, which he has duly perfected.

The only questions in this case relate to the sufficiency of the following instrument as a memorandum to take the case out of the Statute of Frauds, and the admissibility of parol evidence under it:

"CHILLICOTHE, Mo., February 22nd, 1878.

MESSRS. PARLIN & ORENDORFF, Canton, Ill.:

*Gentlemen:* Please execute the following order for plows, cultivators, \* \* etc., to be delivered on board cars in Chillicothe, Missouri, marked for J. F. Lash:

QUANTITY.	OLD GROUND PLOWS, IRON-BEAM.	PRICE.
2.	No. 6. 14-inch cut, medium steel landside.....	\$22 00

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3.	No. 7.	Extra.	16-inch cut, medium steel land-	
			side, three-horse.....	22 00
5.	A 4.	Wood-beam.	12-inch cut, medium steel	
			landside .....	14 25
3.	A 6.	Wood-beam.	14-inch cut, medium steel	
			landside .....	16 75
2.	A 7.	Wood-beam.	16-inch cut, medium steel	
			landside, three-horse.....	20 25

## CULTIVATORS.

50.	Iron-beam.	Parlin's Patent, with shields.....	14 50
19.	Wood-beam.	Parlin's Patent, with shields....	13 50

For which I agree to give you my notes payable with exchange or by express, prepaid, at above list, for plows—less forty-five per cent, and payable all January 1st, 1879, with ten per cent interest from January 1st, 1879. Cultivators, less net per cent, and payable January 1st, 1879, with ten per cent interest from January 1st, 1879.

PARLIN & ORENDORFF,

Per TAYLOR."

Respondents maintain, and the court below held, that it was void for uncertainty, and hence not a sufficient memorandum for any purpose. These questions must naturally be considered together. We entertain no doubt but what the memorandum is sufficient under our Statute of Frauds, as construed by this court. Certainly it is not complete and perfect in itself, so as to render it an artificially drawn contract; but it is sufficiently definite and certain on its face to render it admissible. Being clearly admissible, there can be no doubt under the authorities cited, but what the parol evidence rejected by the court was admissible to explain and apply it to the contract actually existing between the parties. Parlin & Orendorff, the respondents, are the parties to be bound by this contract. It is signed by them by their agent, contains an order on them to deliver certain goods to John F. Lash, the appellant by name; it contains an exact description of the property to be delivered, with

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the price to be paid for each article; it states the manner and place of execution; and it fixes the time and place of payment. This all seems plain enough. Here then we have a paper signed by the parties to be bound, by a person purporting to be their agent, designating on its face the party to be benefited, describing the property to be affected, stating the price to be paid, fixing the manner and place of delivery, and providing the time and manner of payment. Applying the test of common sense to this paper, what else can it mean than that it is intended to contain the memorandum of a contract between Parlin & Orendorff and John F. Lash, all the details of which have not been fully reduced to writing? We cannot read it in any other light.

The rejected parol evidence tended to show that Taylor was the duly authorized agent of respondents, and as such had the goods in his custody at Chillicothe, with power to sell them; that he went to appellant's store in Linneus, and endeavored to sell them to him; that appellant thought there were more of them than he could dispose of, and asked time to look around and see if he could not job some of them off in the surrounding towns of his county; that time was given, and ascertaining that he could so dispose of a sufficient quantity of them to justify the purchase, appellant sent Coons as his agent, to Chillicothe, to close the trade with Taylor; that Coons did close the trade with Taylor as directed, exactly as stated in the memorandum; and that when it was so closed, and certain dispositions had been made of the goods, looking to their shipment according to the disposition made of them by appellant, Taylor executed this memorandum and gave it to Coons to deliver to appellant as evidence of the contract they had concluded. There was other evidence, but the tendency of sufficient has been fairly stated to show its admissibility. Some portions of it may have been incompetent and irrelevant, but those questions need not be determined now.

The case of *O'Neil v. Crain*, 67 Mo. 250, seems entirely

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conclusive of this case. On pages 251, 252, Norton, J., disposes of this general question, and the sufficiency of the memorandum there involved, and the admissibility of parol evidence to explain it, very tersely, thus: "Parol evidence is clearly inadmissible to contradict, alter or vary a written contract, but when a written memorandum of a contract does not purport to be a complete expression of the entire contract, or part of it only is reduced to writing, the matter thus omitted may be supplied by parol evidence. *Rollins v. Claybrook*, 22 Mo. 407; *Moss v. Green*, 41 Mo. 389; *Briggs v. Munchon*, 56 Mo. 467; 1 Greenleaf Ev., § 284 a. The memorandum offered in evidence was as follows: 'Brookfield, September 10th, 1874. William O'Neil, you will please get in 360 hogs instead of 250, if you can, so as to make three car loads at your place. Be careful about the weight. I. I. Crain, Bro. & Co.' The memorandum is silent as to the price to be paid, and does not purport to express the entire contract, and the evidence offered to explain it in this particular, being in nowise contradictory to the writing, was, under the authorities cited, properly admitted." And the other Missouri cases cited in the opinion fully sustain the conclusion reached, as well as the memorandum in question here. *Moore v. Mountcastle*, 61 Mo. 425.

Respondents' counsel stoutly maintain the insufficiency of this memorandum and cite numerous authorities to sustain his position. Browne on the Statute of Frauds is cited and very much relied on; but a critical examination of the sections cited will show that they tend to establish the contrary conclusion. For instance, Mr. Browne in the fourth edition of his work, section 372, says: "It is necessary that the memorandum should show who are the parties to the contract by some reference sufficient to identify them;" and he cites *Champion v. Plummer*, 1 Bos. & P. N. P. 252, as a leading case on the subject, in which "the memorandum was duly signed by the vendor but the name of the purchaser nowhere appeared." The court said the

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memorandum imported a sale to any other person as well as the plaintiff. Not so in the case at bar. Here the memorandum is duly signed by the vendors, by their agent, Taylor, and the name of John F. Lash, the appellant, is designated on the face of the paper as the other party; and it is not difficult to perceive from the entire paper that he was the intended purchaser. What was his name there for? Again, Mr. Browne says: "As to the identification, it is sufficient if, upon the memorandum, in addition to its having the signature of the party to be charged, it appears with reasonable certainty who the other party to the contract is." And as to the admissibility of parol evidence to show the agency, he says: "And the fact that the person to whom such a letter was addressed was the agent of the plaintiff, and received it in that character, may be proved by parol evidence, to show the plaintiff to be the real promisee." The case put in section 374 as deciding the contrary, is manifestly not in point here, while those cited in sections 375 and 376 fully sustain the memorandum in this case, and the admissibility of the rejected parol evidence. On these authorities alone, the case might well be decided against respondents. We have carefully examined all the other authorities cited by counsel for respondents, and are unable to find anything in them impairing the conclusions reached by those cited above, or materially affecting the memorandum in this case. Some are obviously not in point, others relate to lands, and others are in conflict with our own cases cited above. Many strong cases might be cited in support of this memorandum, but regarding the cases in this court as entirely satisfactory on both points discussed, we do not deem it necessary to pursue the subject further.

For the reasons stated the judgment should be reversed and the cause remanded. All concur.



SUTHERLAND V. HOLMES, *Appellant*.

1. **Public Roads: PETITION FOR OPENING.** A petition for the opening of a new road need not show in express terms that the road will be in the county where the proceedings are had. If it defines the location by reference to government surveys, to the names of persons and farms to be touched, and intersections with other known highways in the county, it will be sufficient.
2. ———: **NOTICE OF PROCEEDINGS.** The road law requires notice to be given of the presentation of a petition for the opening of a new road; but does not require copies of the petition to be posted. If, however, such copies are posted, the law will be complied with.
3. ———. It is not error for the circuit court, on appeal from an order of the county court establishing a new road, to permit one of the viewers to testify that no one was present when the view was taken, and that no witnesses were examined.
4. ———: **OATH OF COMMISSIONERS.** Even if the law as it stood in 1877 required the viewers to take an oath, it was not necessary that it should be taken in advance. If their report was made under oath it was sufficient.
5. ———. Any step required by the road law to be taken, not being a jurisdictional fact, will be presumed to have been taken, unless it affirmatively appears to have been omitted.
6. ———: **APPEAL TO CIRCUIT COURT.** Under the road law of 1877 a party dissatisfied with an order of the county court establishing a road might appeal from the whole order or only from the assessment of damages. If he limited his appeal to the latter, the circuit court had only to do with that and was not bound to inquire whether the requisite number of petitioners had signed, the requisite notice been given, etc.

*Appeal from Johnson Circuit Court.*—HON. NOAH M. GIVAN,  
Judge.

AFFIRMED.

*S. P. Sparks* and *W. W. Wood* for appellant.

*F. C. Farr* for respondents.

PHILIPS, C.—This is a proceeding instituted by the respondents, D. L. Sutherland and others in the county court of Johnson county, for opening a new road in said county.

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Sutherland v. Holmes.

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The appellant, Rufus E. Holmes, through whose land the proposed road would run, filed objections claiming damages, as by statute in such cases provided. He had a hearing in the county court on the issues thus made. From the judgment of the county court he appealed to the circuit court, where his damages were re-assessed, and the order of the county court directing the road to be opened was affirmed. From this judgment Holmes brings the case to this court on appeal. The objector assigns various errors, assailing the proceedings of the lower court for alleged irregularities as well as for lack of jurisdiction. These objections will be considered in their order.

I. It is claimed that the petition for the road does not show that the proposed road is in Johnson county. We think sufficient appears, taking the whole petition together, to indicate that the road lay in Johnson county. The petition is addressed "to the county court of Johnson county, Missouri." The location and direction of the road are given, with the sections, townships and range, and the names of persons and farms touched by it, as also its intersection with other known public highways in the county. These were certain to a common intent, and such as would leave no reasonable mind in doubt as to the *situs*. *Long v. Wagoner*, 47 Mo. 178; *Howe v. Williams*, 51 Mo. 252; *Norfleet v. Russell*, 64 Mo. 176

II. It is objected that the preliminary notice of the intended application for this road was insufficient. It appears that copies of the petition itself were put up, whereas the statute, (§ 7, p. 395, Laws of 1877,) then applicable to the case, provided for notice "by printed or written handbills." The petition, a copy of which was put up, showed that it was addressed to the county court of said county at the "November term, 1878." Surely appellant ought not to complain that the petition itself was put up displaying to every one interested the exact line of the road, the names of all the petitioners and the lands touched. As the object of the notice was to afford to interested parties an oppor-



tunity to be present at court, and as this objector did attend the court on the notice, the statutory object in requiring notice was subserved, so far as the appellant is concerned.

III. Error is alleged on account of the imputed action of the circuit court, in permitting one of the commissioners sent out by the county court to view the line of road and assess damages, to testify as to the manner in which he arrived at this conclusion. It is enough to say that the bill of exceptions does not sustain this objection on the matter of fact. The witness, Caldwell, did not state the manner in which the commissioners arrived at their verdict. He merely stated that no one was present at their view, and they examined no witnesses.

IV. Complaint is also made that the trial court erred in permitting petitioners to read in evidence on the hearing in the circuit court the report of the commissioners in the county court. A sufficient answer to this is, that the bill of exception recites: "It is agreed that the transcript of the trial of this cause in the county court, and the original papers, shall be considered in evidence." No objection was then made nor was any exception thereto taken at the time.

V. It is suggested for error that the commissioners did not take the oath of duty prior to entering upon their office. The act of 1877, under which they were acting, did not prescribe any oath. But even if section 18 of the Road Law, (Wag. Stat.) was not repealed, we are not prepared to say that the requirement of this oath involved any jurisdictional question. Be that as it may, the fact appears that the commissioners did make oath to the report before it was acted on, declaring that they had "honestly, faithfully and impartially discharged the duty devolving upon us by virtue of said appointment." This, we think, met the spirit of the law. Again, this report and certificate were read in evidence by agreement. No objection nor exception was taken or saved, nor is this alleged error even called to the attention of the court in the motion for a new trial.

VI. It is next urged that it does not appear that the petitioners asking for this road were freeholders, nor that the commissioners were freeholders. The first of these objections is not borne out by the facts. The petition states the fact, and is expressly found by the county court, as shown by the record admitted in evidence by agreement. As to the second objection—touching the special jury sent out by the county court—it is presumable in such case that the court followed the statute. It not being a jurisdictional fact, it was not necessary that it should appear affirmatively. No such objection was made by the objector to the court at the time of the appointment.

Appellant contends, however, that as the trial in the circuit court is one *de novo*, the record and evidence ought also to show that the circuit court found the jurisdictional fact of the requisite petitioners, notice, etc. It occurs to me that in this suggestion counsel misconceive the real subject matter of litigation in the circuit court, as presented to it by the appeal taken from the county court. Section 5, act of 1877, provides that: "Any person aggrieved by the action of the commissioner may file his objections in writing to such report, and thereupon the said court shall appoint three freeholders to act as a jury, who shall view the premises, etc., and assess the damages." Section 37 provides that: "In all cases of appeals being allowed from the judgment of the county court, assessing damages, or for opening any road, the circuit court shall be possessed of the cause, and shall proceed to hear and determine the same anew." The appellant did file his objections. To what did he object? Simply and only on account of his damages. He asked for the special commissioners to assess his damages. Failing to obtain damages in the county court, he appealed to the circuit court. Section 37 above named, manifestly contemplates that an appeal will lie from the assessment, or the order opening or vacating a road, separately. The appellant by his written objections in the county court, indicated his grievances. He appealed

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on account of his failure in the lower court to obtain damages. That, then, was the cause he had in the circuit court, and that was the matter which the court was to "proceed to hear and determine anew." It is well enough for the circuit court to see that jurisdiction had attached in the lower court over the subject matter. This would be ascertained from the record sent up from the county court. For the purpose of the issue on trial tendered by the appeal in this case, that was sufficient.

There are other errors complained of, but they are trivial. There being no substantial error in the record, the judgment of the circuit court should be affirmed. All concur.

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ROYLE *et al.*, Appellants, v. JONES.

1. **Practice in the Supreme Court: EQUITY.** Even in equity cases, the Supreme Court deems the conclusions of the trial court upon issues of fact entitled to consideration where such court and a jury, with the witnesses before them, have successively reached the same conclusions.

**CASE ADJUDGED.** In a suit to cancel a deed of trust as voluntary and fraudulent, questions were submitted to a jury whether the note secured by such deed of trust was voluntary or not, and whether it was given for money loaned or not, and the jury found for the defendants, and the court subsequently, upon the same and additional evidence, adopted the findings of the jury and dismissed the bill; there was positive testimony that the payee in such note had money at the time, and made the loan: *Held*, that the judgment would not be reversed because of testimony of neighbors of the payee that they did not know he had money, and that his conduct, upon such supposition, was strange and unusual.

*Appeal from Ray Circuit Court.*—HON. GEO. W. DUNN,  
Judge.

AFFIRMED.

*Wallace & Chiles* for appellants.

*Rathbun & Shewalter* for respondents.

NORTON, J.—It appears from the record in this cause that defendant, Alfred Jones, on the 23rd day of July, 1863, conveyed by deed of trust certain lands in Lafayette county to secure the payment of certain debts therein mentioned, among which was a debt to Thomas J. Jones for \$5,350, and interest, evidenced by a note of said Alfred Jones dated October 5th, 1857. The plaintiffs in this suit, who were creditors of said Alfred Jones, obtained judgments against him upon their respective demands in the Lafayette county circuit court in May, 1864, upon which executions were issued and the land conveyed by said deed of trust levied upon and sold, at which sale plaintiffs became the purchasers. Plaintiffs, after having a deed under said purchase, instituted the present proceedings in the circuit court of Lafayette county in October, 1867, and in their petition, after reciting the above facts, in substance allege that said deed of trust executed by said Alfred Jones in July, 1863, was made by him to defraud his creditors, and that said note of said Alfred Jones to Thomas J. Jones was fictitious, fraudulent and void as to said plaintiffs, and that said Alfred was not in fact and truth indebted to said Thomas on said note. The petition concludes with a prayer asking that the said deed of trust, as to them, and the said note to Thomas Jones, be declared and decreed to be voluntary, fraudulent and void, and that it be cancelled. The allegations of the petition were put in issue by answer, and upon a trial of the cause in the Ray county circuit court, where it had been transferred by change of venue, judgment was rendered for defendants, and the bill dismissed.

From this judgment plaintiffs have appealed and seek a reversal thereof upon the ground that it is not sustained by the evidence. It appears from the record before us that the court submitted to a jury the following issues arising

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under the pleadings, viz: (1) Was the note from Alfred Jones to Thomas J. Jones for \$5,350, dated October 5th, 1857, mentioned in the deed of trust, voluntary and without consideration? On this issue the plaintiffs affirmed and the defendants denied. (2) Was the said note given for money loaned by Thomas Jones to Alfred Jones amounting to the sum specified in the note? On this issue defendants affirmed and plaintiffs denied.

It further appears that the jury returned a verdict finding both issues for defendants, and that subsequently the court heard all the evidence in the case, including evidence not given before the jury, adopted their finding, found the other issues for defendants and dismissed the bill. On the trial four witnesses, viz., Thomas Jones, Alfred Jones, William Duggins and Mrs. Duggins testified that the note in question was executed by Alfred to Thomas for money actually loaned at the time of its execution; that the dwelling house of said Alfred had been burned, and that, while he was rebuilding a house estimated to cost from four to six thousand dollars, he lived in a cabin on the farm with Duggins, and the money was borrowed to expend in rebuilding his dwelling. The record fails to show any evidence indicating that at that time said Alfred was either in debt or in embarrassed circumstances, or that any motive whatever existed for the voluntary execution of the note to Thomas without any consideration. There was also the evidence of Joseph and Thomas Shelby showing that said Thomas was a frugal, industrious man, that he had been in their employ, had loaned one of them \$1,000, and that about the time said note was executed they paid him about \$1,600.

The plaintiffs sought to overthrow the case thus made by the evidence of a number of witnesses who testified that they were acquainted with Thomas Jones, before and at the time said note was given, and that they did not know of his having any money. We deem it unnecessary to enter into a detail of this evidence, inasmuch as the result

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of it would be only to show that the witnesses testifying did not know that said Jones, at or before the execution, had money. The case has been once before in this court and is reported in 60 Mo. 454, where the evidence is given in detail. The evidence given on the trial after it was remanded is substantially the same as in that case, with the exception that three witnesses, viz., Wm. Nelson, John Nelson and McGrainner were introduced, and the depositions of Cather and Bullard were read on the last trial to the effect that if Thomas Jones had money they did not know it; that they had some opportunities of knowing; that for aught they knew he might have had money.

In view of the fact that the jury, which had the witnesses before them, found the controlling issues in the case for defendants, and in view of the further fact that the court, after the verdict was rendered, had the witnesses before it and reached the same conclusion that the jury did, the judgment of the trial court is entitled to some consideration, and should not be overturned, except for more urgent reasons than those which have been urged by counsel, and we may well dispose of the case by saying, as was said when the case was before this court in 60 Mo., *supra*, when, after reciting the positive testimony of Alfred Jones, Thomas Jones and Mrs. Duggins and William Duggins to the actual loan of the money and the execution of the note, and the evidence of Henry Jones and Joseph Shelby as to the fact of his having money, it was observed that "we would not be authorized to hold that all of these witnesses are guilty of perjury simply from the fact that the neighbors of Thomas J. Jones did not know that he had money, and because his conduct in reference to his money was rather inconsistent with the usual conduct of young men similarly situated."

The case seems to have been tried in conformity with the theory of the court when it was here before, and the judgment will be and is hereby affirmed, with the concurrence of the other judges.



*WEST V. BUNDY et al., Appellants.*

**Specific Performance:** STATUTE OF FRAUDS. A promise to give land, whether written or verbal, will not be enforced upon the mere proof thereof; but where the promisee, induced by and relying upon such promise, has entered into possession and made improvements, has incurred obligations and expended money for and on account of such land, and has thereby changed his condition in life, equity will compel performance of the promise which, in such case, is regarded as no longer voluntary, but as founded on a valuable consideration, and, although verbal, as not within the statute of frauds.

*Appeal from Andrew Circuit Court.*—HON. H. S. KELLEY,  
Judge.

AFFIRMED.

*L. Douglass and W. W. Caldwell* for appellants.

*Wm. Heren & Son* for respondents.

MARTIN, C.—This was a suit in equity, commenced on the 16th day of February, 1877, for the purpose of adjudging and enforcing a contract for the conveyance of a farm. It was brought by the heirs of Marion Bundy against Milton J. Bundy and Mary A. Adams, the widow of James A. Bundy, deceased. It is alleged in the petition that in February, 1870, James A. Bundy, deceased, was owner in fee of the farm in controversy, situated in Andrew county, containing about 400 acres; that sometime in the same month, for a good and valuable consideration, he gave this farm to Marion and Milton, who were his two sons; that immediately thereafter Marion went into possession, and Milton soon after entered with him into the joint possession thereof; that they expended great labor and large sums in making valuable improvements thereon, claiming the same as their own; that said James A. Bundy, the donor, promised to deed the farm to them and made out deeds for the same, but neglected to deliver the same as he

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had promised; that Marion died in possession of said farm intestate and unmarried, and that plaintiffs are his heirs.

It is further alleged that after the death of Marion, his brother Milton, in 1873, brought suit against James A. Bundy, the donor, to compel a specific performance of his contract to give a deed; that said suit was compromised by a decree vesting the whole title in said Milton; that in the decree the right of Marion to one-half of the farm was recognized, and that said Milton gave his notes in the sum of \$5,000 therefor to said James A., secured by a deed of trust on the land deeded to him as aforesaid. It is alleged that said James A. died in July, 1875, and that the heirs of said Marion, plaintiffs to this suit, are also the heirs of said James A. The plaintiffs claim that said Marion was entitled in equity to one undivided half of said farm, and that the same is vested in the plaintiffs. It is prayed that the judgment in the compromise suit be set aside, and that Milton J. be adjudged to convey an undivided half of said land to plaintiffs.

After the suit was brought, Mary A. Adams, the widow of James A. Bundy, and her second husband, upon their joint application, were made parties to the suit. Milton J., being a non-resident, came in after publication, and suffered default while personally present in court. This left the litigated part of the controversy to go on between the plaintiffs and the widow of James A. Bundy, who claimed to be his sole devisee and owner of the notes and deed of trust. In her answer, after admitting the ownership by James A. Bundy, and the fact of the suit and the compromise, she makes denial of the petition. She also sets up new matter, to the effect that the notes and deed of trust were given to James A. Bundy in consideration of his procuring a quit-claim deed to said Milton from one Douglass, who possessed the legal title to the land; that the quit-claim was procured and the notes and deed of trust were delivered to said James A. in his lifetime, who assigned and delivered them to her trustee for a good and lawful



consideration; that she is the legal owner of the notes and deed of trust; that Milton J. is possessed of no property in this State out of which the same can be made; that James A. Bundy died in April, 1874, and left her sole devisee as to all his real and personal property; that as the widow of James A. she is entitled to one-third of the land and notes in the right of dower; that Milton J., in 1875, entered into possession and is now wrongfully in possession of said undivided third, unjustly withholding the same and the rents and profits thereof. The court found the issues in favor of the plaintiffs, and rendered a decree to that effect on the 10th day of December, 1877. Mrs. Adams and her husband have prosecuted this appeal.

It only remains for us to determine whether the evidence supports the decree. It will be necessary for us to recite the substantial part of the testimony, noting the controverted points to which it was directed. That the testimony should be conflicting in a case of this kind is to be expected. Notwithstanding this, the equity to be administered in this case ought to be clear and commanding, to justify the issue of its extraordinary and far-reaching mandates. The counsel for the defendants have furnished a very elaborate and able brief discussing the principles which govern the character of this class of actions. This is altogether unnecessary. The equity invoked by the plaintiffs has been so often recognized and defined in the decisions of this State that nothing is left for conjecture or debate. An agreement for the gift of lands will not be enforced against the donor upon mere proof of the promise or undertaking to give, however clearly it may be proved, and whether it be written or verbal. As long as the obligation is executory and rests solely upon the declarations, promises and undertakings of the donor, he may revoke it and equity will not compel him to fulfill it. But when the promise has been accepted in good faith, and the donee on the strength of it has changed his condition in life, entered into possession of the land, made improvements, incurred obli-

gations and expended money for and on account of it, equity will compel the donor to keep his agreement and make perfect his gift. Under these circumstances it is held that the acts and doings of the donee take the promise out of the statute of frauds if it is by parol. And whether written or not written, it ceases to be any longer a voluntary agreement; the acts and doings aforesaid of the donee taking the place of and constituting a valuable consideration to support the promise and call for its enforcement. There is no doubt about this being the law in this as well as most of the states. *Halsa v. Halsa*, 8 Mo. 303; *Sutton v. Hayden*, 62 Mo. 101; *Sitton v. Ship*, 65 Mo. 297; *Lobdell v. Lobdell*, 36 N. Y. 327; *Freeman v. Freeman*, 43 N. Y. 34; *Peters v. Jones*, 35 Iowa 512; *Bright v. Bright*, 41 Ill. 97; *Shepherd v. Bevin*, 9 Gill 82; *Neals v. Neals*, 9 Wall. 1.

The only difficulty which is encountered attends the application of these principles to the contradictory and conflicting testimony which is almost invariably presented in this class of actions. It appears from the evidence that, in 1869, James A. Bundy was a gentleman of considerable wealth, valued at \$35,000, or more, residing in Galesburg, Illinois, his wife still living; that he had two sons named respectively Marion and Milton, both married men; that Milton was residing in Kansas on a farm of his own which his father had helped him to purchase; that Marion was a man of dissipated habits, whose wife had been compelled to leave him and sue for divorce; that his father thought it would be beneficial to him to settle him down on a farm, and to that end looked round for one; that after examining several in company with Marion, he finally concluded a purchase of the one now sued for, which pleased him, and bought it from Mr. Sanders, the owner, for \$14,000, of which three or four thousand dollars were paid down in cash, and the balance in the following March, when possession was to be given. At the time of the purchase Mr. Bundy declared frequently that the farm was bought for Marion, and that he intended he should have it. Marion

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entered upon the place at once in 1869 with the license and permission of Sanders, and was allowed to do anything there which would not conflict with his work or interest. He boarded with Sanders, hired men and planted hedges and re-set rail fences. In the spring of 1870, he purchased property for the farm, but with money furnished by his father. James A. Bundy, after shipping some hogs to the farm, came out from Galesburg about the 1st day of March. On being asked when he purchased the farm, to whom the deed should be made, he said, after some little hesitation, to himself, conveying the impression that he wanted to see how Marion would conduct himself. Mr. Sanders testified that Marion received the farm and regulated it as his own.

It seems that prior to this purchase the father in company with Marion had visited Milton in Kansas, and gave him to understand they were looking at farms in Missouri, had selected this one but would not buy till it was seen by their mother; that immediately after it had been seen by her, and had been purchased, James A. Bundy wrote to Milton to that effect, but did not say for whom he had bought it; that in December, 1869, after the death of Mrs. Bundy, the father wrote to Milton that the farm was large enough for both Marion and himself, and that if he would go over to it he would give it to them. This letter was lost. Milton, on receiving the letter, visited the farm in December, 1869, found Marion on it with the Sanders family, stayed a week, and then returned to Kansas to prepare to remove his family. He was accompanied with Marion who stayed till January 1st, 1870, when they both returned to the Missouri farm taking along some goods. After staying in Missouri a few days they returned to Kansas, made sale of Milton's goods and returned again to Missouri. Their father was then on the farm. In February, 1870, Milton unloaded a part of his goods, when a misunderstanding took place between him and his father about the management of the place, and after staying two weeks he moved back to Kansas.

In May, 1870, James A. Bundy returned to Galesburg, where he stayed till October, 1870. He then took a trip to California, and there married his second wife, defendant in this case. He returned with her to the farm in December, 1870, where he remained some time, then returned to Galesburg where he stayed a few months, and then went to Massachusetts. These must have been only temporary trips, as Mrs. Adams testifies that they resided on the place from December, 1870, till October, 1871, when they went to California on account of Mr. Bundy's health. They returned in March, 1872, to the farm, and left it for Galesburg in May, 1872, where they continued to reside. During this year Marion was paralyzed by a fall from his horse, so that he became a helpless invalid who had to be fed at the table. In October, 1872, James A. Bundy wrote a letter to Milton saying that he intended to give them the farm. On the faith of this letter he moved to it, again leaving his farm in Kansas. In this letter, which is lost, Milton was invited to come and take charge of the farm, take care of Marion, who was an invalid, and not expected to live long, and have the whole farm on Marion's death. Milton moved on the farm, took care of Marion till he died in 1873, and continued to reside on it and use it as his own. He divided the rents and profits with Marion till his death, and after that received them entirely to himself. During this time he broke up twelve or sixteen acres of wild land, trimmed hedges, repaired fences, built a feed lot, put in a pump, seeded down about ninety acres in grass and paid taxes and insurance on the place. Waterhouse, a witness, corroborates Milton in respect to declarations by his father that the place was to be given to the boys, and that Milton was to have it after the death of Marion.

Matters thus continued till 1873, when it would seem that Milton became solicitous about the promised conveyance, and writes to his father about it. On the 12th day of February, 1873, his father, from his home in Galesburg, answers as follows:

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"GALESBURG, ILL., February 12th, 1873.

"MILTON: I have just got and read your long letter. I just mailed you a long letter. I am perfectly surprised at your letter, and in answer will only say that I have made a deed to you and Marion to the farm; I fully intend you to have it. You need have no fears of my going back on what I say to you."

On the 3rd day of May, 1873, the father writes again:

"GALESBURG, ILL., May 3rd, 1873.

"MILTON: I undertake to answer your unwise letter again. I wrote you to Kansas on this subject, and I supposed that would be a finality in the matter, etc. You have no reason to dispute my word as you do, when I tell you time and again the same thing—that I have made a deed to the farm to you and Marion, and I did it understandingly, and have no disposition to want to change it. I have not said a word nor had a thought of selling the place. I have no care of it whatever—leave that matter entirely with you and him. I shall pay no attention to it, no more than if I had never owned it. You and him can do just as it suits you. Now I wrote you this much to Kansas."

These letters contained other matters which need not be mentioned here. They would seem to indicate that the inner life of the Bundy family was somewhat wanting in that domestic sweetness and repose which nothing but mutual confidence and affection between its members can guarantee or preserve. There are several letters from Milton to his father in September, October and November, 1873, in which it is evident he is disappointed at not getting the promised deed for the place. He describes the condition of his place in Kansas as depreciated and wasted, by reason of his absence in Missouri, and intimates that he cannot give up the Kansas place and continue on the Missouri farm any longer than the coming season, while the title was still withheld from him. Marion was dead and Milton was settling up his affairs.



Late in 1873 Milton brought suit against his father to compel a conveyance of the land according to his promises. On the 9th day of June, 1875, this suit was compromised. At the time of the compromise, it appears that the title of James A. Bundy had been conveyed to Leander Douglass, one of Mrs. Bundy's present attorneys, on the 13th day of November, 1873. By the compromise the full title to the land was vested in Milton Bundy by execution of a quit-claim deed from said Douglass. Milton then executed a deed of trust upon the whole tract to secure \$5,000 payable to Mrs. Bundy's trustee. The next month James A. Bundy died, leaving a will wherein he bequeathed \$5 apiece to each of his children and grandchildren, and the balance of his estate, amounting to about \$25,000, he devised to his widow.

It is objected by the counsel for appellant that the evidence is too vague and uncertain to establish the existence of a contract or promise to convey. If the promise to convey is to be gathered from the repeated declarations of the donor, the objection might be considered, but even then I am inclined to think that they disclose with sufficient certainty the intent of the donor to convey the farm to his sons, and this is the ultimate fact to be proved. *Sutton v. Hayden*, 62 Mo. 101. But outside of the oral declarations, the assurance that the farm was theirs is written down so clearly in his letters as to leave no doubt about the matter. These letters also corroborate Milton in his testimony that similar letters had been written to him while he was in Kansas in October, 1872, upon the faith of which he came the second time and took possession of the farm. The testimony of Mrs. Adams, that the sons were as tenants and not as donees, is not sustained by anything I have been able to discover, which points to a tenancy. What was said by Marion about the farm when creditors visited him for payment, is not entitled to much weight in the determination of the true relation which existed between him and his father. The same is true about the power of attorney which

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he held. I am satisfied that the court was right in adjudging the gift which had been accepted and acted upon so long by the sons, that it would have been a wrong on the part of their parent to refuse to keep his promise of a deed.

It may to a casual reader seem strange that, if the parent actually intended to give his sons this farm, he should have been so vacillating in his conduct. By his second marriage, in 1870, a new member was introduced into the family, whom he had undertaken to provide for. It is natural that she should not favor the fulfillment of the promise. It is evident that she possessed sufficient influence to overcome his written and oral wishes in the matter. The same influence which could obtain a secret deed from him to her attorney, and secure a will which gave everything he died possessed of, disinheriting children and grandchildren, must have been sufficient to forbid the promised conveyance. It certainly was sufficient, after a deed to the farm was delivered to her attorney in November, 1873. After that the donor was no longer able to do as he wanted to. The secret deed and the will constitute the key of the situation, which unlocks the chambers to his home in Galesburg, and exhibits the donor promising the Missouri farm to his sons, while being secretly persuaded to give it to his wife. In his deposition taken in the suit of his son Milton against him, he says: "I encouraged the plaintiff (Milton) to believe I intended to give him the farm in my letters, and in no other way." Upon the whole I am satisfied that the evidence supports the decree.

The widow was not entitled to dower in this land, because her husband had impressed it with the trust in equity prior to his second marriage. But as sole devisee under the will of her husband, James A Bundy, she is owner of that portion of Marion's half which he inherited from Marion as well as that portion he inherited from his daughter Angeline Gordon who died after Marion and before the testator, aggregating about five-fortieths of the whole title. Milton is

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entitled to a similar quantity in the same way. The interests of all parties in the land ought to be recited. The decree will be reversed and cause remanded with directions to enter a modified decree for plaintiffs, reciting the interests and estates of the parties according to the evidence in the record as set forth in this opinion. PHILIPS, C., concurs; WINSLOW, C., absent.

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HENRY *et al.*, Appellants, v. MCKERLIE.

1. **Administrator or Curator's Sale:** WHEN APPROVED, VESTS TITLE, WITHOUT MORE. When a sale by an administrator or curator under an order of court has been regularly approved by the court, this fact of itself passes to the purchaser an equity for the legal title, which equity, notwithstanding an irregular deed or the want of any deed, the court will enforce in his favor by denying recovery in ejectment by the heirs, or by vesting him with the perfect title; provided, always, that he has on his part complied with the terms of the sale.
2. ———: WHEN NOT APPROVED, PURCHASER'S EQUITY: ITS NATURE AND EFFECT: ESTOPPEL. When the sale has not been approved, no title either legal or equitable passes to the purchaser; but he has an equity for a return of the purchase money, and re-imbursement for the benefits received by the heirs and for improvements which enhance the value of their lands. The extent of this equity is to be ascertained by an account of his expenditures and receipts. The effect of it is to suspend the right of recovery until the amount coming to him shall be ascertained and paid. It is administered upon the theory that the title has not passed to the purchaser, but that he has a charge or lien for his outlays and improvements made in good faith. It does not spring from or depend upon the law of estoppel; neither does it exclude the purchaser from lawfully claiming the title under the law of estoppel in a proper case.
3. ———: WHEN PREMATURELY APPROVED—IN THE CIRCUIT COURT. When the sale has been prematurely approved in the circuit court, as this is a court of general jurisdiction, the sale is valid, and the equity of the purchaser is for a perfect title, and will defeat recovery in ejectment.
4. ———: ———, IN THE PROBATE COURT. When the sale has been



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prematurely approved in the probate court, this fact was by the earlier decisions in this State regarded as equivalent to no approval at all. The sale was regarded as absolutely void and passing no title either legal or equitable, and the purchaser had only such equities as he would have had if there had been no approval. But this doctrine has been overruled by the later decisions, and such sales are now held to be as valid as if the approval had been in the circuit court, on the ground that the same presumptions of validity must be entertained in respect to judgments and orders of the probate court in matters relating to the administration of estates, as are accorded to the judgments and orders of the circuit court.

5. — : EVIDENCE OF APPROVAL. The approval of the sale by the court need not necessarily appear by a formal entry. It is sufficient if the approval can be gathered from the whole record. The equity for a title is then complete.
6. — : APPEAL. An appeal from a final order of the circuit court disapproving a sale which has been approved by the probate court before appeal to the circuit court, may be taken to the Supreme Court.
7. — : PLEADING. The facts which constitute an equity under the foregoing rules must be pleaded in order to be available as a defense to an action of ejectment. It is not essential to the validity of a curator's deed that it should recite the order of sale, appraisement, report of sale and approval of sale. The statute requires these recitals to be made; but this is only directory. If the facts exist they may be shown *aliunde* to support the deed.

The deed in this case referred to the order of sale and the court and term at which it was made, and the curator assumed in it to act only in his fiduciary capacity. *Held*, sufficient to pass the title.

*Appeal from Livingston Circuit Court.*—HON. E. J. BROADDUS,  
Judge.

AFFIRMED.

*L. T. Collier* for appellants.

*W. C. & J. W. Samuel* for respondent.

MARTIN, C.—The plaintiffs filed their petition in ejectment on the 4th day of April, 1879, to recover from defendant possession of 100 acres of land.

In 1864 one David S. Riffe died seized of this land,  
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leaving as his heirs two minor children named Lois and Annie, who are the plaintiffs in this suit along with Clarence K. Henry, the husband of Lois. The defendant claimed title by virtue of a deed from George McKerlie dated March 3rd, 1869, conveying to him the 100 acres sued for. George McKerlie's title, as to 98 acres of the tract sued for, was derived from a sale made to him by William W. Walden, as guardian and curator of Lois and Annie, plaintiffs, on the 4th day of November, 1868. As to the remaining two acres it was derived from a sale made by R. Matson, as public administrator in charge of the estate of said David S. Riffe, deceased. His deed is dated November 13th, 1866, and includes some forty more acres not in controversy in this case.

In his answer the defendant denied the plaintiffs' right to the land, and set up an equitable defense to the effect that he had purchased at full value and paid the consideration; that he had made lasting and valuable improvements; that this was all done in good faith and without notice of the claim of plaintiffs, who resided in the same neighborhood, and had knowledge of the defendant's possession, acts and improvements. The answer contained a prayer that an account be taken, that his purchase money and all moneys expended for improvements, payment of taxes, etc., be refunded, and adjudged a lien or charge upon the land, concluding with a prayer for general relief. The replication of plaintiffs contains a denial of this defense, and a statement that the plaintiffs were minors until within a year before suit.

The evidence tended to sustain the allegations of this special defense. It seems that defendant had paid \$1,100 for the land, had expended \$267 for taxes, and that his improvements were of the value of \$1,966. The material question in the case relates to the sale by Walden, as guardian and curator of plaintiffs. The deed of the guardian contains no recitals of the appraisement, order of sale, or approval of sale. There was also a slight mistake in its

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description of the land. The defendant introduced the records of the probate court of Livingston county for the purpose of supplying these defects. They disclosed an application for an order of sale, an order of sale at private vendue, an order of approval and a certificate of appraisal. The order of sale was made on the 18th day of April, 1868, at the April term, and the sale was approved at the same, although adjourned, term on the 11th day of May, 1868. The only irregularity apparent in these proceedings consists in the action of the court approving the sale at the same term at which the sale was made, instead of the next regular term of the court, as required by law. Notwithstanding this defect, the court found that the defendant was possessed of the equitable title to the land. It permitted the misdescription in the deed to be corrected, and rendered judgment in favor of defendant.

The questions involved in this controversy have been considered by the Supreme Court in so many cases varying in their facts, that I propose to review its decisions for the purpose of ascertaining the equity which at the present day is administered in this class of cases. The embarrassment attending the defendant's title in this case was first encountered in the case of *Wohlien v. Speck*, 18 Mo. 563, in which the opinion was rendered by Judge Scott in 1853; and as there were several cases on the same title I will consider them first, in the order of their rendition, before noticing the other cases bearing on the same question.

In *Wohlien v. Speck*, 18 Mo. 563, the plaintiff sued in ejectment, deriving title as heir of the person who died seized of the land as lawful owner. The defendant's title came by sale conducted by the administrator of said deceased, under an order of the probate court. The sale was approved at the same term at which it was made, instead of the succeeding term, as required by law. There seems to have been no deed by the administrator. No equitable defense of any kind was interposed, and the court held that

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no title passed by the sale, rendering judgment for the plaintiff.

The defendant who had suffered defeat at law, brought a bill in equity against the plaintiff for the purpose of divesting the title of the heir and vesting it in himself. The opinion in this case was also rendered by Judge Scott, in 1855. *Speck v. Wohlien*, 22 Mo. 310. It was held that no legal or equitable title passed at the sale, and that the purchaser thereat had no equity for a title and could not call upon the heir to perfect it. It may be remarked in connection with this case that no equity for return of the purchase money or re-imbursement for improvements was set up in the answer, and no such equity was suggested or intimated by the court.

The controversy about the same title assumed another aspect a few years afterward in the case of *Wolff and Speck v. Wohlien*, 32 Mo. 124, in which the opinion was rendered by Judge Dryden, in 1862. It seems that the parties claiming under the administrator's sale, on notice to the heirs, moved in the probate court that the sale be approved again, some twelve years after it was made, and the court granted an order approving it. The heirs appealed from this order to the St. Louis land court, without any bill of exceptions. The case was taken thence by change of venue, and by consent of parties, to the St. Louis circuit court, where on trial *de novo*, the sale was disapproved. Thereupon the parties who had moved for the approval in the probate court, appealed from the decision of the circuit court disapproving the sale. But it was held by the learned judge rendering the opinion, that while an appeal from an order of approval was provided for in the statutes, there could be no appeal from an order of disapproval; which was in the nature of an order granting a new trial. When a sale was disapproved there had to be another sale. This final judgment of disapproval left the title in the same condition in which it was left after the sale and premature approval.

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Another ejectment by the same party was attempted in the case of *Speck v. Riffin*, 40 Mo. 405, in which the opinion was rendered by Judge Wagner, in 1867, who held that the previous decisions had settled the title against the plaintiff, and that the suit presented nothing new to be determined.

In considering the cases which commenced and continued to appear in the reports after the beginning of the controversy about the title in *Speck v. Wohlien*, I will first notice *Valle v. Fleming*, 19 Mo. 454, in which Judge Scott rendered the opinion in 1854. In this case it was held, that an administration sale wanting the approval of the court was void; and that a receipt of the proceeds, especially by minors, could not validate it. It was held that the order of approval need not appear by formal entry or in express terms.

*Valle's Heirs v. Fleming's Heirs*, 29 Mo. 152, opinion by Judge Napton, in 1859. In this case the heirs of the deceased owner brought ejectment. The defendants, who claimed under sale by an administrator, which had not been approved, set up an equitable defense to the effect that the money paid by the purchaser at the administrator's sale had been applied by the administrator in lifting a mortgage from the land, and asking to be subrogated to the rights of the mortgagee. This was not an equity for the title, but rested upon the assumption that the sale was void, and that no title passed, either legal or equitable. The defendants claimed only the equity of a lien-holder, by reason of having in good faith paid off a certain lien, which inured to the benefit of the heirs. This equity was conceded to him, and possession denied to plaintiffs until payment of the amount so expended by defendants. The opinion went further and approved the doctrine which awards the value of improvements made in good faith by a purchaser at a void sale, believing his title to be good. Judge Scott dissented to the views held by the court.

*Strouse v. Drennan*, 41 Mo. 289, opinion by Judge Wag-

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ner, in 1867. In this case the sale was by a guardian under an order of the probate court, and the sale was approved the same day it was made. It was held that no title passed. No equity was set up by defendant.

*Mitchell v. Bliss*, 47 Mo. 353, opinion by Judge Bliss, in 1871. The report of an administrator's sale, under an order of the probate court, was approved at the same term at which it was made. It was held that no title passed, and that the court could not help out the execution of a statutory power. No equity was pleaded by defendant.

*State to use of Perry v. Towl*, 48 Mo. 148, opinion by Judge Bliss, in 1871. In this case the plaintiff brought suit on a guardian's bond to recover the proceeds of a sale made by the guardian under an order of the circuit court. The defendant pleaded that the sale was void because of approval at the same term at which it was made. This was held to be no defense, and the sale was pronounced valid. The court made a distinction between a premature approval of a sale by the circuit court and a similar approval by a probate court. It was held that as the former was a court of general jurisdiction, an order in it, however erroneous, could not be impeached in any collateral proceeding.

*Castleman v. Relfe*, 50 Mo. 583, opinion by Judge Wagner, in 1872. The purchaser at a guardian's sale brought suit against the guardian and others to cancel the unpaid purchase notes and to compel a return of the money paid by him on account of the purchase, alleging that the sale was void because it was approved at the same term at which it was made. But as the sale was made under an order of the circuit court, it was held that it was valid notwithstanding this irregularity, which could not be permitted to impeach its validity in a collateral proceeding.

*McVey v. McVey*, 51 Mo. 406, opinion by Judge Wagner, in 1873. This case rose upon proceedings undertaken to obtain a second approval of the sale. A private sale had been made by a curator under an order of the county court in 1856. The sale had been approved at the same



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term at which it was made. At the May term, 1869, the parties representing the purchaser, after notice to the heirs, asked for an approval, and it was approved by the county court thirteen years after the sale. Appeal was taken to the circuit court of the county, and afterward by change of venue the case was taken to Moniteau circuit court. The court decided that there could be no trial *de novo* on the appeal, but that it must be decided upon the record in like manner as cases are disposed of in courts of error. The case was tried in this manner and the action of the county court was reversed, and the order of approval set aside. In the Supreme Court it was held that an appeal lies from an order of approval, and that the appeal brings up the record as on *certiorari*. It was also held that an appeal to the Supreme Court can be taken from an order or judgment of the circuit court on appeal disapproving a sale, thus overruling the case of *Wolff and Speck v. Wohlien*, 32 Mo. 124. It was held that the sale could be approved again after the lapse of thirteen years, and the judgment of the circuit court disapproving the sale was reversed, and the action of the county court approving it was affirmed.

*Shroyer v. Nickell*, 55 Mo. 264, opinion by Judge Sherwood, in 1874. Although this case did not rise from an administrator's or guardian's sale, the doctrine announced is the same which has been invoked in such cases. A widow sued in ejectment for her real estate, which she had assumed to convey by joining with her husband in his lifetime. The acknowledgment by her was fatally defective. The defendant asked for a reform of the deed and for a specific performance of the contract of sale. It was held that as the acknowledgment did not conform with the statute, which alone enabled her to sell, the deed was void; and its reformation was denied. But the decision expressly recognizes the equity of the purchaser, so far as it extends to the purchase money and the improvements.

*Jones v. Manly*, 58 Mo. 559, opinion by Judge Sherwood, in 1875. Ejectment by the minor heirs of the de-

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ceased owner. The sale of the administrator had been in compliance with an order of the probate court. The record disclosed no formal entry of an order approving the sale. But there were sufficient entries of record to indicate that the sale had been approved by the court. The defendant below had set up an equitable defense, similar to the one contained in the case of *Valle's Heirs v. Fleming's Heirs*, 29 Mo. 152. The circuit court on motion struck it out, and gave judgment for the plaintiffs. This action of the circuit court was held to be erroneous, and the doctrine, upon which the equity of such defense rests, was approved.

*Bobb v. Barnum*, 59 Mo. 394, opinion by Judge Napton. in 1875. A purchaser at a curator's sale sued for rescission of the sale, return of the purchase money and cancellation of the deed. The deed failed to recite the time, terms, place of sale and order of approval of sale. The report of sale had in fact been approved at the same term at which the sale was made, but as it was conducted under an order of the circuit court, it was held to pass the equitable title to the purchaser. As the purchaser was entitled to a deed, and the defendants averred a willingness to give him one, it was held that the plaintiff had no case for a rescission of the sale or for return of the purchase money.

*Grayson v. Weddle*, 63 Mo. 523, opinion by Judge Napton, in 1876. It was held in this case that if it can be gathered from the whole record that the sale has been approved, although a formal entry to that effect may be wanting, the sale will be sustained; and the deed of the administrator may be reformed, if the omission is not that of a duty required by statute.

*Evans v. Snyder*, 64 Mo. 516, opinion by Judge Sherwood, in 1877. The title of the heirs in this case was asserted in an action of ejectment. There appeared to have been no order of court authorizing a sale. The defense consisted of a general denial, and a special defense in equity to the effect that the purchaser at the sale had paid the purchase money, and that it had been applied to payment



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of debts of the deceased. The court rendered judgment for the plaintiff. It was held in the upper court that without an order of sale there could be no valid sale; but that upon the transaction as a void sale the defendant was entitled to the equity set up by him for re-imbursement; and the case was reversed and remanded for the purpose of adjusting that equity.

*Johnson v. Beazley*, 65 Mo. 250, opinion by Judge HENRY, in 1877. The question in this case related to the effect of an administrator's deed. It was contended that the deed passed no title, because the appraisement had been made by only two appraisers instead of three; and because the deceased at the time of his death had his abode in another county, and that in consequence of this fact the court had no jurisdiction over the estate of the deceased and no power to appoint an administrator. It was held that the deed could not be impeached by such facts in a collateral proceeding. The faith and verity to be accorded to judgments and orders rendered in the probate court was elaborately reviewed; and the conclusion was reached, that in respect to the jurisdiction of that court in the administration of the estates of deceased persons, it was original, general and exclusive, and that as a court of record exercising such jurisdiction, the same presumptions must be entertained in support of its judgments and orders on this subject which are entertained in support of the judgments and orders of courts of general jurisdiction.

*Sims v. Gray*, 66 Mo. 614, opinion by Judge HUGH, in 1877. The plaintiff sued in ejectment. The title of defendant rested upon an administrator's sale. The report of sale had been approved by the probate court at the same term at which it was made. The defendant, following the early decisions, framed his answer upon the assumption that the deed of the administrator was void, and that no title passed by virtue of the sale. He set up the equity of payment for the land and permanent improvements upon it, made in good faith, but asking for no relief. It was held that

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the answer was defective, in the omission of such prayer. The defendant had not offered his deed in evidence. The decision did not stop with this ruling about the proper method of pleading the equity contended for by defendant. It proceeded to give to the defendant a legal title, when he had ventured to hope for only an equitable one. It was held that the deed was not invalidated by an approval of sale at the same term at which it was made, and that it should have been introduced in evidence. It was held that the "probate court was a court of record, having complete jurisdiction of the subject matter of the proceeding; and while such jurisdiction must be exercised according to law, yet if the court exceeds its powers under the law, and disregards the statutory requirements established for its guidance, its acts may be irregular, but they will not be void." The early decisions to the opposite effect were noticed in this case, and attention was called to that provision in our practice act which impliedly authorizes any court of record, on motion, to set aside for irregularities any of its judgments, within three years after the rendition thereof. R. S. 1855, p. 1290, § 26; Wag. Stat., 1062, § 26. This was regarded as a remedy which supplied in a measure the place of a writ of error, and removed the principal ground of discriminating against the effect of judgments rendered in the probate court.

*Long v. Joplin Mining & Smelting Co.*, 68 Mo. 422, opinion by Judge SHERWOOD, in 1878. In an action of ejectment the defendant, who was a purchaser at the administrator's sale, set up the equity of payment of purchase money, and improvements made in good faith. It was held that from the whole record it appeared that the sale had been approved by the court, although there was no formal entry to that effect, and that consequently the equitable title, irrespective of any deed, passed to the purchaser, which would be sufficient to defeat an action of ejectment.

*Gilbert v. Cooksey*, 69 Mo. 42, opinion by Judge HENRY, in 1878. The sale by the administrator in this case had

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been approved, but there was a mistake in the description of the land in the report. It was held that: "As the report embraces the land in the general terms employed, and in the number of acres reported as sold, and the defendants have paid \$2,800 for the land, they have rights which a court of equity will recognize and enforce." It was further held that equity could not vest the title in the purchaser.

*Snider v. Coleman*, 72 Mo. 568, opinion by Judge SHERWOOD, in 1880. In this case the purchaser set up in defense to the ejectment an equitable defense, to the effect that he had purchased for full value at an administrator's sale under order of the probate court, and that he had made large and valuable improvements on the land in good faith, and praying to be subrogated to the rights of the creditors, and for an account, and for general relief. The administrator's deed was excluded in the lower court for want of an acknowledgment and seal, and judgment was rendered for plaintiff. The case was reversed on the ground that outside of the deed the defendant had an equity in the facts pleaded by him, which ought to be disposed of on its merits.

*Greene v. Holt*, 76 Mo. 677, opinion by Judge SHERWOOD, in 1882. In this case it appeared that the land described in the administrator's deed was not included in the petition for or the order of sale. It was held that nothing could cure the defect. No outside equity was asserted.

*Exendine v. Morris*, 76 Mo. 416, opinion by Judge HOUGH, in 1882. The question in this case related to the validity of a guardian's sale under special act of the legislature, which required it to be approved by the county court. The deed of the guardian referred to the act of the legislature, and the facts necessary to authorize its execution were shown *aliunde*. No form of deed was designated by the act. The sale had been approved. It was held that although some of the acts of the guardian were irregular, they could not be attacked collaterally.

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It will be observed from these decisions that there are two general remedies furnished by equity on the subject of administrator's and guardian's sale of real estate, according to the facts disclosed. In one the equity of the purchaser for a title is recognized and enforced; in the other he has no equity for a title, but only for a return to him of whatever he has expended in good faith for and on account of the land, in so far as these expenditures have benefited the heirs or improved the land. The distinction between these equities is marked, and the purchaser cannot safely expect to have a decree for one upon facts supporting the other, or have the advantage of either, without in some manner setting them out in his pleadings and asking for the appropriate relief. Upon the whole these decisions may be taken as authorizing and supporting the following conclusions:

I. When the sale by an administrator or curator under an order of the court has been regularly approved by the court, this fact of itself passes to the purchaser an equity for the legal title, which equity, notwithstanding an irregular deed or the want of any deed, the court will enforce in his favor by denying recovery in ejectment, by the heirs, or by vesting him with the perfect title; provided, always, that he has on his part complied with the terms of the sale. *Grayson v. Weddle*, 63 Mo. 523; *Long v. Joplin Mining & Smelting Co.*, 68 Mo. 422; *Gilbert v. Cooksey*, 69 Mo. 42.

II. When the sale has not been approved, no title either legal or equitable passes to the purchaser. The equity open to him proceeds upon the assumption of a void sale, and is for a return of the purchase money, and re-imbursement for the benefits received by the heirs and for improvements which enhance the value of their land; the extent of this equity to be ascertained by an account of his expenditures and receipts. This equity suspends the right of recovery until the amount coming to him shall be ascertained and paid. It is administered upon the theory that the title has not passed to the purchaser, but that he has a charge or lien for his outlays and improvements incurred

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by him in good faith. *Valle's Heirs v. Fleming's Heirs*, 29 Mo. 152; *Evans v. Snyder*, 64 Mo. 516; *Sims v. Gray*, 66 Mo. 614; *Snider v. Coleman*, 72 Mo. 568; *Schafer v. Causey*, 76 Mo. 365. I may here add by way of qualification to this doctrine, that the logic of it does not spring from or depend upon the law of estoppel. Neither does it exclude the purchaser from lawfully claiming the title under the law of estoppel, when sufficient facts are present in his case to support a title by estoppel. *Huff v. Price*, 50 Mo. 228.

III. When the sale has been prematurely approved in the circuit court, as this is a court of general jurisdiction, the sale is valid and the equity of the purchaser is for a perfect title, and will defeat recovery in ejectment. *State to use of Perry v. Towl*, 48 Mo. 148; *Castleman v. Relfe*, 50 Mo. 583; *Bobb v. Barnum*, 59 Mo. 394.

IV. When the sale has been prematurely approved in the probate court, this fact was by the earlier decisions regarded as equivalent to no approval at all. The sale was regarded as absolutely void and passing no title either legal or equitable. *Wohlien v. Speck*, 18 Mo. 563; *Speck v. Wohlien*, 22 Mo. 310; *Wolff and Speck v. Wohlien*, 32 Mo. 124; *Speck v. Riffin*, 40 Mo. 405; *Strouse v. Drennan*, 41 Mo. 289; *Mitchell v. Bliss*, 47 Mo. 353. Whatever equity enured to the purchaser depended upon such facts as are described by us in the second conclusion recited by us as applying to void sales. But by the most recent decisions of the Supreme Court this doctrine, which first rose in the case of *Speck v. Wohlien*, 22 Mo. 310, and which for a long time prevailed in this State, has been overruled; and such sales are now held to be as valid as if the approval had been in the circuit court, on the ground that the same presumptions of validity must be entertained in respect to the judgments and orders of the probate court in matters of the administration of estates as are accorded to the judgments and orders of the circuit court. *Johnson v. Beazley*, 65 Mo. 250; *Sims v. Gray*, 66 Mo. 614; *Fisher v. Basset*, 9 Leigh 119; *Wilkerson v. Allen*, 67 Mo. 502; *Den ex Dem. Obert v. Ham-*



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mel, 18 N. J. L. 75; *Hahn v. Kelly*, 34 Cal. 391. It thus appears that the doctrine of *Speck v. Wohlien* is a thing of the past, and has given place to a more just and rational doctrine, which cannot fail to have a good effect upon this class of litigation. While the doctrine prevailed that a premature approval in the probate court was no approval at all, the courts, in their efforts to escape the injustice of the doctrine, commenced to hold that the sale might be approved twelve and thirteen years after it had taken place, so as to pass a valid title to the purchaser. *Mc Vey v. Mc Vey*, 51 Mo. 406.

V. The approval of the sale by the court need not necessarily appear by formal entry of an order. It is sufficient if the approval can be gathered from the whole record. The equity for a title is then complete. *Jones v. Manly*, 58 Mo. 559; *Grayson v. Weddle*, 63 Mo. 523; *Long v. Joplin Mining & Smelting Co.*, 68 Mo. 422; *Gilbert v. Cooksey*, 69 Mo. 42.

VI. An appeal from a final order of the circuit court disapproving a sale which has been approved by the probate court before appeal to the circuit court, may be taken to the Supreme Court. *Mc Vey v. Mc Vey*, 51 Mo. 406.

It ought not to be difficult to dispose of this case after subjecting its facts to the test embraced in the foregoing conclusions of law prevailing at present on the subject of these sales. The sale was made by a curator under an order of the probate court. No notice of application for the order was required by law. A private was equally valid with a public sale. Although the sale was approved during the same term of the court at which it was made, under the late decisions of this court its validity cannot be attacked on that account, in a collateral proceeding like the one on appeal. The approval of the sale passed to the purchaser an equitable title sufficient, when set up, to defeat an action in ejectment. It thus appears that the evidence in the record would sustain a judgment for the defendant. But the facts upon which this equity is founded are not pleaded.



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The answer contains no allegation of an order of sale, or an order of approval of the sale as made. It is, therefore, impossible to administer the equity to which the defendant is entitled, for the reason that it is not pleaded. If the equity which is pleaded, and which is founded upon the assumption of a void sale, is to be administered, then the case will have to be reversed for the purpose of an accounting.

Under the issue raised by the general denial in the answer, the defendant is at liberty to prove that he has the legal title. Inasmuch as the deed of the curator was given in evidence, if that deed constituted a sufficient execution of the statutory power of sale, then the judgment for defendant ought to be affirmed. As to the land covered by it the defendant would possess a perfect legal title.

When the deed was first offered in evidence, it was upon objection of plaintiffs, excluded as not containing a sufficient description of the property sold. In the order of sale the land is described as the "Northeast quarter, section 14, township 56, range 24, except forty-two acres off the west part." In the curator's deed it is described as "Ninety-eight acres, the remainder of the northeast quarter of section 14, township 56, range 24." After this ruling of the court the defendant amended his answer and asked to have the deed corrected. It was corrected and reformed by the court so as to read: "Ninety-eight acres off of the east side of the northeast quarter of section 14, township 56, range 24." After this correction it was admitted in evidence.

It was objected by plaintiffs that the proper parties to justify the reformation of the deed were not before the court, and that the court erred in making the correction. It is unnecessary to consider the merits of this objection as I am satisfied that the description as contained in the deed before its correction was certain and definite enough, under the evidence in the record relating to the subject of the sale. It appears from the evidence that section 14 was a

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fractional section, and that the northeast quarter contained 143.86 acres. It also appears that on the 13th day of November, 1866, the administrator of the estate sold 3.86 acres off of the west side of the quarter section, in the same deed which conveyed the northwest quarter, which is not in dispute in this case. It further appears that on the 8th day of April, 1868, the same administrator sold forty-two acres more off of the west side of the northeast quarter now in dispute. These two sales would leave just ninety-eight acres remaining to the heirs for sale. On the 18th day of April, 1868, after the last sale, but before making of the deed, the order of sale under which the curator acted was made. It will be seen that the order does not mention the number of acres remaining or intended to be sold. But on its face it is broad enough to cover the whole quarter section except the forty-two acres last sold by the administrator. There is a slight inaccuracy in this. It should also have excepted the 3.86 acres previously sold in 1866. But the order is not void because it apparently includes a small parcel of land already disposed of. It is good as to the ninety-eight acres remaining undisposed of. When the curator executed his deed he very properly included only the ninety-eight acres which he had the right to sell. He assumes to convey "ninety-eight acres, the remainder of the northeast quarter section 14." When this language is interpreted in the light of the preceding sales, it obviously means the remainder of the land belonging to the heirs left unsold. Where that remainder is in the quarter section appears in the evidence, and in the order of sale to which the deed makes reference. It is on the eastern side, because the order excepts the land sold on the western side. It is evident that the order referred to in the deed, along with the language of the deed itself, makes the description of the land conveyed very definite and certain. The correction, therefore, was immaterial and unnecessary. *Gilbert v. Cooksey*, 69 Mo. 42.

It is objected that the deed fails to convey the legal

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title because of the omission by the grantor to recite the order of sale, appraisement, report of sale and approval of sale. The statute directs the curator to embody these recitals in his conveyance. And he should always obey the direction. But an omission to observe the direction ought not necessarily to vitiate the deed. A deed with such recitals is *prima facie* evidence only of the facts so recited. The recitals effect nothing more. If in truth it appears that there was no order of sale or approval of a sale made, the curator has no authority to sell, and his deed is absolutely void, notwithstanding the regularity of its recitals. It is the order of sale and the approval of a sale made which constitutes the authority of the curator to make a deed, and not the recital of such orders. The orders are essential, the recitals are only convenient, but not conclusive evidence of the orders. The recitals are only in the nature of evidence of essential facts, and do not constitute necessary or essential facts to the power of conveyance. The facts which authorized the curator in this case to make a deed have all been established *abunde* the deed. The land was appraised; it was ordered to be sold; the sale was reported, and it was approved by the court. These record facts vested the curator with full power and authority to make a deed to the purchaser. A deed which, under the law of conveyances, contains the essential requisites of a conveyance made by a person under a special power or authority, ought to be sufficient to pass title. Such we consider the deed in this case. The curator making it refers to the order of sale and the court and term at which it was made, and assumes in it to act only in his capacity as curator in selling what he had been ordered by the court to sell. I think it is sufficient to pass the title which he had full power and authority to transfer.

The defendant's title for the two acres derived at the administration sale of Matson does not seem subject to the objections which have been urged against the curator's sale. The objection that a sufficient time for notice could not

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have elapsed before the order of sale was made, is not well taken. The notice of application for the order was made at the May term, 1865, and gave until the first Monday in August, 1865, at the August term, for interested parties to object or show cause against the granting of the order. Of course the order entered in June, 1865, to sell in November, 1865, was premature under the notice, and ought not to have been made before the August term. But according to the recitals in the deed this is not the order under which the sale was made. The deed recites an order of sale made at the November term, 1865, which order, it is recited, was renewed on the 2nd day of July, 1866; and was executed on the 2nd day of October, 1866, and approved at the succeeding November term, 1866. These recitals which are *prima facie* evidence of the record facts, cannot be impeached by simple proof of a premature order to which they evidently do not refer. Especially must this be the only tenable conclusion in absence of any evidence to establish the want of the further order to which the deed evidently refers. The palpable insufficiency of the first order must have given occasion for the second one which is referred to in the deed.

Our conclusion upon the whole case is, that the judgment of the circuit court should be affirmed, and it is so ordered. All concur.

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MORRISON *et al.*, Plaintiffs in Error, v. GARTH.

**Alteration of Note.** Any alteration of a written instrument, after delivery, however immaterial in its nature, or however innocently made, without the consent of all parties, vitiates the instrument as to the parties not consenting.

**CASE ADJUDGED.** A note signed by C. & G. and by S. D. G. payable to the order of S. D. G., after its delivery to the parties for whom it was intended, was by them sent to S. D. G., who erased

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his signature as maker, indorsed said note and returned the same without the knowledge or consent of the other makers. *Held*, that, as to them, such alteration rendered the note void.

*Error to Jackson Special Law and Equity Court.*—HON. R. E. COWAN, Judge.

AFFIRMED.

*Karnes & Ess* for plaintiffs in error.

*F. Titus* for defendants in error.

WINSLOW, C.—This action is based on two promissory notes, both of the same tenor and date, one due in eight and the other in ten months after date. The petition is an ordinary declaration on indorsed and protested negotiable promissory notes against the makers and indorsers, and seems to be sufficient. The answer of S. D. Garth, who is sued as indorser, is a general denial. The answer of H. C. Garth, who, with Sanford Congdon, is sued as maker, under the firm name of Congdon & Garth, after a general denial, sets up an alteration of the notes, after delivery, without the knowledge or consent of the makers. There was a general reply to this defense. Congdon filed no answer. No demurrer was interposed to the petition, but on the trial defendants objected to the introduction of evidence under it, because it improperly joined two separate causes of action in one count; because defendants were improperly joined as makers and indorsers; because the notes sued on were not negotiable promissory notes, and because it failed to state facts sufficient to constitute a cause of action; all of which were overruled by the court.

The notes, certificates of protest and the deposition of Joseph C. Alexander, one of the plaintiffs, explaining the circumstances under which the notes were executed and the alleged alterations made, and proving how notice of protest was sent to the indorser, were all read in evidence against the objections of defendants. At the conclusion of

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plaintiffs' evidence, defendants interposed a demurrer to the evidence, which the court sustained; the plaintiffs took a non-suit, and having duly perfected their record bring the case here for review by writ of error.

The protests are in the common form in use by notaries in this State, signed by the protesting notary and sworn to before another. They tend to show a timely presentation of the notes, as they became due, at the banking house of J. Q. Watkins & Co., a demand and refusal to pay, a formal protest and notice to the indorser. The notice for S. D. Garth, the indorser, was sent under cover to the plaintiffs, at their usual post-office address in New York; and the deposition of Joseph C. Alexander, one of the plaintiffs, shows that it was duly received, in each instance, and mailed to Garth, at his usual post-office address in Missouri. Some technical objections are raised, but not strongly urged, to those protests, but perceiving no material defects in them, or the notice, we will omit any further statement of this branch of the case.

All the other questions in the case arise on the face of the notes, which are exact copies, except as to the time of the payment. The first note due is in this form, as it appears in the record:

"\$376.00

KANSAS CITY, MO., June 15th, 1875.

Eight months after date we promise to pay to the order of S. D. Garth, \$376, at the banking house of J. Q. Watkins & Co., value received, with interest at the rate of seven per cent per annum from date, with exchange on New York. Due 13--18 February.

CONGDON & GARTH.

Indorsed: S. D. GARTH.

Pay to the order of J. Q. Watkins, cashier.

MORRISON, HERRIMAN & Co."

Joseph C. Alexander, the only witness introduced, testified, by deposition, in substance as follows, on the subject of the execution, delivery and alteration of the notes: "Am



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a member of the firm of Morrison, Herriman & Co., which is composed of the plaintiffs; the notes sued on were received by plaintiffs from Congdon & Garth in part settlement of goods sold and delivered them by plaintiffs on four months time; after the maturity of the debt, plaintiffs requested them to settle the balance of their account; to which they replied that they were unable to do so then; but if eight and ten months time were given them, they would give two notes indorsed by S. D. Garth; to which plaintiffs assented; and the notes sued on were executed accordingly; that said notes were sent to plaintiffs' firm's place of business, signed Congdon & Garth; and, also, the signature of S. D. Garth was underneath that of the firm of Congdon & Garth; that said notes were made payable to the order of S. D. Garth, and that when the plaintiffs' firm received them they discovered that said notes were not indorsed by S. D. Garth, whereupon they sent the notes back to S. D. Garth to have him indorse the same; that the plaintiffs' firm subsequently received said notes back with the name of S. D. Garth erased from the bottom of said notes, and with his indorsement on the back; that said erasure was made by S. D. Garth to correct a mistake, he having signed said notes at the bottom instead of on the back."

The controlling question in this case relates to the alteration of the notes, by the erasure of the name of S. D. Garth from the face, and placing it on the back, after their execution and delivery, by S. D. Garth, at the request of the payees, and without the knowledge and consent of the makers. That this was done was made clear beyond all question by the testimony of Joseph C. Alexander, one of payees. The rule is now firmly established in this State, that any alteration of a written instrument, after delivery, however immaterial in its nature, or however innocently made, without the consent of all the parties, vitiates the instrument. This question has been recently examined and put to rest in this court in the case of *First National Bank*

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of *Springfield v. Fricke*, 75 Mo. 178, where the cases in this court are reviewed, and their doctrines re-affirmed. That case is entirely conclusive of the one at bar, on the several points involved. In fact this case is somewhat stronger in its facts; because here the name of a party, who apparently signed as maker, is erased, at the instance and for the convenience of the payees, without consulting the makers, and again signed on the back as an indorser; thereby changing the apparent nature of the contract. This suit is based upon the notes, and the question of the liability of Congdon & Garth for the original debt, mainly discussed by appellants' counsel, cannot affect this controversy. On the authority of the above cited case, and others cited, the judgment should be affirmed. *First National Bank of Springfield v. Fricke*, 75 Mo. 178; *Moore v. Hutchinson*, 69 Mo. 429; *Capital Bank v. Armstrong*, 62 Mo. 59; *German Bank v. Dunn*, 62 Mo. 79; *Evans v. Foreman*, 60 Mo. 449; *Haskell v. Champion*, 30 Mo. 136.

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THE STATE V. DICKSON, *Appellant*.

1. **Evidence of Identity.** On questions of identity the impressions and beliefs of a witness are competent evidence. It is also competent to identify a dead body by means of articles found upon it. Circumstantial evidence of identity, which leaves no room for reasonable doubt, is sufficient.
2. **Murder: CORPUS DELICTI: EVIDENCE.** The criminal act and defendant's agency in its production, constitute the *corpus delicti*. The proof thereof need not be by direct and positive evidence, but may be by that which is probable and presumptive, if it be strong and cogent and leave no room for reasonable doubt.
3. ———: **EVIDENCE: CONCEALMENT.** The concealment of the fact of a homicide is presumptive evidence of crime.
4. ———: ———. Misrepresentations, to account for the disappearance of one who has been killed, are competent, as presumptive evidence of guilt.

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5. ———: ———: ILL-WILL. Expressions of ill-will and declarations of criminal intention toward one, who shortly afterward is killed, are competent, as presumptive evidence of guilt.
6. **Case Adjudged.** Defendant was found guilty of murder in the first degree for the killing of one M. upon evidence of the finding of a dead body covered with wounds indicating death by violence, the identification of this body as that of M. by the opinions of witnesses based upon resemblances of clothing, of the color of the hair and beard, and the absence of an upper front tooth, and by means of articles found upon the body, the concealment by defendant of the homicide, and his false statements to account for the disappearance of M. after the killing, his expressions of ill-will and declarations of evil intent toward M. shortly prior to his disappearance; *Held*, that this court would not reverse on the ground of failure of evidence to support the verdict.
7. **Murder in the First Degree: INSTRUCTIONS.** Where there is no evidence of any other grade of offense than that of murder in the first degree, it is proper to refuse instructions as to any less grade of homicide.

*Appeal from Stoddard Circuit Court.*—HON. R. P. OWEN,  
Judge.

AFFIRMED.

The instructions following were asked and given on behalf of the State:

1. If the jury believe from the evidence that, on or about the 11th day of March, 1880, at the county of Stoddard and State of Missouri, the defendant, Thomas T. Dickson, willfully, deliberately, premeditatedly and of his malice aforethought, killed James McNab with any instrument or weapon whatever, they will find the defendant, Thomas T. Dickson, guilty of murder in the first degree, and so state in their verdict. Willfully, as used in this instruction, means intentionally, that is, not accidentally; therefore, if defendant intended to kill, such killing is willful. Deliberately means done in a cool state of the blood, that is, not in a heated state of the blood caused by a lawful provocation; if, therefore, in such state, the defendant, Thomas T. Dickson, formed a design to kill, and did kill, the

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act was deliberately done. Premeditatedly, as here used, means thought of beforehand, for any length of time however short. Malice, as used in this instruction, signifies a condition of the mind void of social duty and fatally bent on mischief, or an unlawful intention to kill, or do some great bodily harm to another, without just cause or excuse. Aforethought means thought of beforehand, for any length of time however short, for a moment as well as for a day or month.

2. If the jury believe from the evidence that the defendant, Thomas T. Dickson, made any statement after the commission of the homicide or killing in relation to what had become of James McNab, the jury must consider all he said together, and what he said against himself the law presumes to be true, because against himself; what he said for himself, the jury are not bound to believe, because said in a conversation or conversations proved by the State, but they may believe or disbelieve it as shown to be true or false from all the evidence in the case.

3. The court further instructs the jury that he who willfully, that is intentionally, uses upon another, at some vital part, a deadly weapon of any kind, must, in the absence of qualifying facts, be presumed to know that the effect is likely to be death, and knowing this must be presumed to intend death, which is the probable and ordinary consequence of such an act; and if such deadly weapon is used without just cause, he must be presumed to do it wickedly, or from a bad heart. If, therefore, the jury believe from the evidence in this case that the defendant took the life of James McNab by cutting or striking him in a vital part with any deadly weapon whatever, with a manifest design to use such weapon upon him, and with sufficient time to deliberate and fully form the conscious purpose to kill, and without sufficient reason or cause or extenuation, then such killing is murder in the first degree, and while it devolves on the State to prove the willfulness, deliberation, premeditation and malice aforethought, all of

which are necessary to constitute murder in the first degree, yet these need not be proven by direct evidence, but may be deduced from all the facts and circumstances attending the killing; and if the jury can satisfactorily and reasonably infer them from all the evidence, they will be warranted in finding the defendant guilty of murder in the first degree, and should so find in their verdict.

4. Evidence is of two kinds, direct and circumstantial. Direct is where a witness testifies directly of his own knowledge of the main fact or facts to be proven. Circumstantial evidence is the proof of certain facts and circumstances in a given case, from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind. If, therefore, the jury believe from the evidence in this case that such facts and circumstances have been proven as to satisfy you beyond a reasonable doubt that the defendant did willfully, deliberately, premeditatedly and of his malice aforethought kill James McNab, as defined by the first instruction given herein, the jury are warranted in finding the defendant guilty as charged, though no witness has testified of his own knowledge as to the actual fact of such killing.

5. Before the jury can convict the defendant of murder in the first degree in this case, they must believe from all the evidence, beyond a reasonable doubt, that he is guilty as charged; but a doubt, to authorize an acquittal, must be a real substantial doubt, arising from a fair view of all the evidence in the case, and not a mere possibility of his innocence.

The instructions following were asked and given on behalf of the defendant.

1. To justify a conviction in this case, the State must prove all the material facts alleged in the indictment against the defendant, beyond reasonable doubt, by evidence entitled to a fair and reasonable degree of credit, and unless

the State has so proven the guilt of the accused, the jury ought to acquit.

2. Before the jury would be justified in convicting the defendant of murder in the first degree, the State must prove that he killed the deceased deliberately, premeditatedly and with malice aforethought, and unless the prosecution has so established his guilt, they ought not to convict.

5. Where the State seeks, as in this case, to convict upon circumstantial evidence only, the inculpatory or criminative facts must, to justify a conviction, be not only consistent with guilt, but should be inconsistent with any other reasonable hypothesis consistent with innocence; and before the jury should convict, they ought to be satisfied from the evidence and facts proven, beyond reasonable doubt, that his guilt has been so established, and, if not so established, you ought to acquit, although you may believe the probabilities of guilt greater than the probabilities of innocence.

7. Before the jury should convict the defendant, they should be satisfied, from the evidence, that the State has established, beyond reasonable doubt, that James McNab is dead, that the body found has been fully identified and proven to be his dead body, that he came to his death by criminal violence, and that the defendant inflicted the violence intentionally, that caused his death, in Stoddard county, Missouri, under such circumstances as to constitute some legal offense, that is, that he was killed by defendant under such circumstances as to be neither justifiable or excusable, and unless you believe from the evidence that the State has so established his guilt, you ought to acquit.

8. The jury are the sole judges of the weight and value of the evidence in the case, and the credit to be given to the testimony of the several persons who have given evidence upon this trial; and in deciding that credit ought to be given to the testimony of any witness, it will be proper to consider the appearance of the witness, the promptness



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or reluctance with which he gave his answer, his candor or want of candor, the probabilities or improbabilities of his statements when contrasted with reasonable and known facts, and if from any one or all of these you doubt or disbelieve any portion of the evidence to be true, you are at liberty to disregard and reject all or so much of his testimony as is inconsistent with known and reasonable facts within the common experience of daily life.

The instructions following were asked on behalf of defendant, but refused by the court:

3. If the jury believe from the evidence that the State has proven all the facts to fully establish that the defendant did kill James McNab; yet if the State has failed to establish the mode and manner of the killing, beyond the fact that he killed him with a deadly weapon in some way unknown, the law presumes the death to have been caused by a wound intentionally inflicted with a deadly weapon, and nothing further appearing, that the offense is murder in the second degree.

4. Before you should convict the defendant of murder in the second degree, the State must establish that the defendant killed the deceased with malice aforethought and with premeditation.

6. No inference of any fact is entitled to credit, which is itself drawn from premises which are uncertain; and where circumstantial evidence is alone relied on to establish guilt, the inculpatory circumstances must be proven and not presumed. Presumptions, which the jury are required to make, are not circumstances in proof, and can afford no proper foundation for a further presumption, there being no visible or natural connection between the fact or facts out of which the first presumption arises and the ultimate fact sought to be established. A presumption is an inference of a fact, drawn from other known or admitted facts, and is entitled to credit only when the inference is drawn from such known facts.

9. Defendant asks the court to instruct the jury upon

the law of murder in the second degree and the several grades of manslaughter and justifiable homicide.

*S. M. Chapman* for appellant.

*D. H. McIntyre*, Attorney General, for the State.

SHERWOOD, J.—The indictment in this case charged the defendant, Thomas T. Dickson, with murder in the first degree, for killing James McNab, and the trial resulted in the defendant's conviction of that degree of homicide. The evidence, for the most part, was circumstantial. The errors assigned may be grouped under three heads: 1st, The failure of the evidence to establish the guilt of the defendant. 2nd, The giving of improper instructions on the part of the State, and the refusal to give proper instructions on the part of the defendant. 3rd, The conduct of the counsel for the State in argument of the cause to the jury. We will consider these points in the order presented.

### I.

And first as to the evidence and the sufficiency thereof. In December, 1879, Dickson and McNab rented a farm from Pasley a few miles from Essex in Stoddard county. McNab boarded with Dickson. There were some large walnut logs in the southwest corner of a field on this farm, and McNab and Dickson were heard to say a few days prior to McNab's disappearance, that they were going to cultivate this field, and were going to bury these logs, as it would be cheaper to do this, than to have a log-rolling. McNab was last seen alive near these logs, at work cutting corn-stalks, late in the evening of March 10th, 1880, some 200 yards from the dwelling house. Smoke and fires were seen near where McNab was at work. Next day Dickson was seen at work in the same field mending log-heaps; and he told Pasley that McNab had gone to Arkansas, to arrest one Buchanan, for the murder of Dodson, and some days thereafter, Dick-

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son told the same witness he had buried the logs. From two to five days after McNab was last seen, Dickson called on Pasley, his landlord, stating that he had buried the logs, and demanding pay therefor. He also stated, at various times in the spring of 1880, to several other witnesses that he had buried the logs, and that McNab had gone to Arkansas, for the purpose already mentioned.

McNab owned two horses. About the 1st day of March, 1880, Warren went to the farm rented by Dickson and McNab, to buy a horse of the latter, but not agreeing upon the price, the horse was not bought. Dickson was present at the attempted purchase, and when McNab walked away, Dickson said to Warren: "He can't sell either of those horses, till he pays me. He owes me over \$100 for board. He has boarded with me over a year, and has not paid me. He is the d—dest dead beat I ever saw. He shall not eat my bread and meat much longer." About the 8th day of the same month, McNab sold to Azbel a gun for \$4, stating that he did so to get money to replevy his horses and to pay for their keeping. After McNab disappeared, both these horses, as well as a chest of tools, remained in Dickson's possession. Dickson said in the presence of another witness, about the 15th day of March, 1880, that McNab went off in his ordinary clothing, leaving everything; that he did not propose to let him take the horses while he was owing him. In the same month Dickson said in the presence of another witness that McNab left his horses and other stuff with him; that McNab owed him \$100; that if he came back he could have one of the horses; otherwise he would keep everything.

On the 19th day of March, 1882, an adult male human body was found in the southwest corner of the field, buried under one of the walnut logs, near where McNab was last seen at work. The log was somewhat burned on the under side, and was buried in the ground, the body being buried under the log. One hand of the body seemed burned as well as the lower part of the pants. Two wounds, either

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one of which would have proved mortal, were found on the body; one on the right temple, the other on the right side, evidently inflicted by the hand of violence, with some sharp instrument. The former wound pierced the skull and was about three inches long; the latter wound cut two of the ribs in two, and broke three others, bending them inward.

The *corpus delicti*, was in our opinion, sufficiently established. That the human being whose body was found. came to his death at the hand of violence.

**1. EVIDENCE OF IDENTITY.**

admits of no sort of question. That it was identified as that of James McNab, is not, it is true, so conclusively proven, nor need it be. One witness testified: "To the best of my impression it was the body of James McNab." Another testified: "I saw a body that I took to be the body of James McNab, taken from under one of those logs." Other equivalent expressions were used by other witnesses, who were also acquainted with McNab, and all those who had known McNab gave certain reasons as resemblances of clothing, of color of hair and beard, and the absence of an upper front tooth, which induced their belief. On questions of identity, it is not necessary that a witness should swear pointedly; it is only necessary and is of common occurrence, for them to swear that they believe the person to be the same, and the degree of credit to be attached to their evidence, is a question for the jury. *Greenwell v. Crow*, 73 Mo. 638; 1 Greenleaf Ev., § 440; Stark. Ev., 173. And besides, the body was otherwise identified by means of articles found upon it: A quarter of a dollar with a hole in it; two pocket knives; a whetstone; a small glass, and two rings. And it is undoubtedly competent thus to identify the remains found. *State v. Williams*, 7 Jones (N. C.) 446; 3 Greenleaf Ev., § 133. It is not necessary in such cases that the remains be identified by direct and positive testimony; it suffices if the circumstantial evidence establishes their identity in a manner so

satisfactory as leaves no room for reasonable doubt on that point. Will's Circ. Ev., 164.

The proof of the *corpus delicti* involves of course two things: 1st, A criminal act; 2nd, The defendant's agency in the production of the act. Wharton 2. MURDER: corpus delicti: evidence. Crim. Ev., § 325, and cases cited. "But, (as is well said by an eminent author heretofore cited,) it is clearly established, that it is not necessary that the *corpus delicti* be proved by direct and positive evidence, and it would be most unreasonable to require such evidence. Crimes, and especially those of the worst kinds, are naturally committed at chosen times, and in darkness and secrecy; and human tribunals must act upon such indications as the circumstances of the case present or admit, or society must be broken up. Nor is it very often that adequate evidence is not afforded by the attendant and surrounding facts, to remove all mystery, and to afford such a reasonable degree of certainty as men are daily accustomed to regard as sufficient in the most important concerns of life; to expect more would be equally needless and absurd." In *Burdette's case*, 4 B. & Ald. 121, this subject underwent much discussion, and was elaborately treated by the bench. Mr. Justice Best said: "When one or more things are proved from which experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen, as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none; for then we have something like an admission that the presumption is just. It has been solemnly decided that there is no difference between the rules of evidence in civil and criminal cases. If the rules of evidence prescribe the best course to get at the truth, they must be and are the same in all civilized countries. There is scarcely a criminal case from the highest down to the lowest in which courts of justice do not act

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upon this principle." His Lordship added: "It, therefore, appears to me quite absurd to state that we are not to act upon presumption. Until it pleases providence to give us means beyond those our present facilities afford of knowing things done in secret, we must act on presumptive proof, or leave the worst crimes unpunished. I admit where presumption is intended to be raised as to the *corpus delicti*, that it ought to be strong and cogent." Will's Crim. Ev., pp. 158, 159; *State v. Williams, supra*; 3 Greenleaf Ev., §§ 80, 121, and cases cited.

Now in the present case the admissions of Dickson, repeatedly made, that he buried the logs, carry with them the rational inference that he dug the hole in the ground for the log and that he placed the body of McNab first in the hole, and then placed the log on top of the body. What was his purpose in thus concealing the fact of the homicide? The only reasonable inference which can be drawn from such premises, is that he did so in the endeavor to conceal his own criminal agency in effecting McNab's death. At least it is "highly probable" that this was the motive that prompted him, and under the authority of *Burdette's case, supra*, this is sufficient; for it is one of the badges of guilt to attempt concealment of the act done; and the probable inference, therefore, is where a homicide has been committed and the body is concealed, to connect the individual who conceals it with the crime as author or participator. Burrill Circ. Ev., 83.

But other facts in this case must not be overlooked, and doubtless were not overlooked by the jury who tried it and weighed the whole evidence when endeavoring to reach the proper conclusion. We allude to the evidently false statements as to the cause of McNab's disappearance, if his body was in fact found buried under the log. These misrepresentations as to the cause of such disappearance could only spring from a consciousness of guilt on Dickson's part which sought protection in false-



hood, (*Commonwealth v. Goodwin*, 14 Gray 55,) and a desire to divert suspicion from himself, by the fabrication of evidence as to the reason of that disappearance. A common instance of this sort of fabrication, resorted to by the perpetrators of crime with the view to escape detection and its consequences, is where, as here, the accused spreads reports that a missing or murdered man has "gone to a distance," seeking thus to divert suspicion from the scene of the crime and the real criminal. *Burrill Circ. Ev.*, 430, and cases cited.

We allude also to an evident feeling of enmity which Dickson felt toward McNab, as shown by his remarks to *Warren*. Mr. Burrill, speaking of verbal indications of intended crime, says: "These expressions of ill-will assume a variety of forms, according to the character and strength of feeling which prompts them. Sometimes they are uttered in terms of intense though respectful complaint; attempts being at the same time made to arouse resentment on the part of the persons addressed, against the subject of them; at other times, they are expressed in the undisguised form of opprobrious epithets, charging some injurious act." *Ib.*, 336. As for instance, in *How's case*, the prisoner had called the deceased "a cursed villain, and the greatest enemy he had." 2 *Wheeler's C. C.*, 415. In another case the expression was "he deserves to have his throat cut." *Harrison's case*, 12 *State Tr.* 841. In another the prisoner said "she wished Mr. Spooner was out of the way; she could not live with him;" that "she wished old Bogus was in heaven." *Spooner's case*, 2 *Chandler Am. Crim. Tr.* 20. In one pre-eminently atrocious case of parricide, the malignant passion burst all bounds, and disclosed itself in a torrent of imprecations and curses almost too violent for belief. *Trial of Standsfield*, 11 *State Tr.* 1396.

We allude also to the remark Dickson made respecting McNab that "He shall not eat my bread and meat much longer!" Such language in view of subsequent events, is

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what is termed "declaration of intention." "It is not uncommon with persons about to engage in crime, to utter menaces, or to make obscure and mysterious allusions to purposes and intentions of revenge, or to boast to others, whose standard of moral conduct is the same as their own, of what they will do, or to give vent to expressions of revengeful purposes, or of malignant satisfaction at the anticipated occurrence of some serious mischief. Such declarations or allusions are of great moment, when clearly connected by independent evidence with some subsequent criminal action. The just effect of such language is to show the existence of the disposition from which criminal actions proceed, to render it less improbable that a person proved to have used it would commit the offense charged, and to explain the real motive and character of the action." *Burrill's Circ. Ev.*, 338; *Will's Circ. Ev.*, 45.

Taking then the whole evidence in this cause; considering the fact of the dead body having been found with **6. CASE ADJUDGED.** mortal wounds upon it, clearly indicating a death by violence; considering the fact of the defendant having concealed the homicide—he must, according to rational inference, no other agency for the perpetration of the homicide appearing, be regarded as the author of or participator in that crime. Considering the evident feeling of ill-will which he bore McNab; considering the false reports which he circulated respecting his absence; considering the defendant's declarations of criminal intention toward McNab, as verified by subsequent events; considering the identity of the body as having been satisfactorily established as that of McNab by resemblances as to clothing and certain personal peculiarities, as well as by certain articles found on the body; considering in short, all the concomitant circumstances which seem to "coil around the prisoner and fasten him to the guilty deed," it is beyond our province to interfere with the province of the jury, and to declare that their verdict finds no support in the evidence.

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## II.

In regard to the instructions: Taking them as a whole, as well those given for the State as for the defendant, we think they correctly stated the law applicable to the facts of this case, as previously announced in this opinion, and as heretofore announced by this court. The error contained in the first instruction for the State in respect to deliberation, was a harmless one, and has been criticised in the *State v. Talbott*, 73 Mo. 347. The first, second, third and fifth instructions for the State, in this case, were such as were given in that case. And the trial court properly refused to instruct the jury on any grade of homicide less than murder in the first degree. There was evidence from which the jury could well deduce inferences of the perpetration of that grade of homicide, and there was no evidence of a different grade of offense having been committed. Of consequence, it would have been error to instruct as to any other grade of the offense charged. *State v. Talbott*, *supra*. It is only upon proof of an intentional killing, nothing more appearing, that the law will presume the homicidal act to be murder in the second degree. *State v. Underwood*, 57 Mo. 40.

## III.

The principle decided in the *State v. Zumbunson*, (at the last term,) controls this one, and prevents a reversal on account of remarks made by the prosecuting attorney. It only remains to say that the judgment must be affirmed, and the law take its course. All concur.

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 Gilbraith v. Gallivan.
 

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GILBRAITH, *Appellant*, v. GALLIVAN.

**Married Woman's Deed:** CORRECTION OF CERTIFICATE OF ACKNOWLEDGMENT. After a married woman's deed had been delivered, and the officer who certified the acknowledgment had gone out of office, he undertook to correct a defect in the certificate. *Held*, that his act was void for want of power. *Wannall v. Kem*, 51 Mo. 150; *s. c.*, 57 Mo. 478, distinguished.

*Appeal from Johnson Circuit Court.*—HON. NOAH M. GIVAN, Judge.

REVERSED.

*J. M. Crutchfield and Land & Sparks* for appellant, cited *Elliott v. Persoll*, 1 Peters 328; *Bours v. Zachariah*, 11 Cal. 281; *Merritt v. Yates*, 71 Ill. 636; *Ellwood v. Klock*, 13 Barb. 50; *Watson v. Bailey*, 1 Binn. 470; *Jourdan v. Jourdan*, 9 Serg. & Rawl. 268, 275; *Ennor v. Thompson*, 46 Ill. 214; *O'Ferrall v. Simplot*, 4 Green (Iowa) 162; *Stanton v. Button*, 7 Conn. 527; *Pendleton v. Button*, 3 Conn. 406; *Hayden v. Wescott*, 11 Conn. 129; *Mariner v. Saunders*, 5 Gill. (Ill.) 113; *Moore v. Tisdale*, 5 B. Mon. (Ky.) 352; *Woods v. Polhemus*, 8 Ind. 60; *Chauvin v. Wagner*, 18 Mo. 531; *Silliman v. Cummins*, 13 Ohio 116; *Martin v. Dwelz*, 6 Wend. 9; *Carr v. Williams*, 10 Ohio 305; *Looney v. Adamson*, 48 Tex. 619; *Jackson v. Ingraham*, 4 John. 163; *Williams v. Soutter*, 55 Ill. 130; *Willis v. Gattman*, 53 Miss. 721; *Abbott's Trial Ev.*, 174, § 15.

*O. L. Houts* for respondent.

WINSLOW, C.—This is an action of ejectment for an undivided interest in 160 acres of land in Johnson county, Missouri, commenced in the circuit court of that county, January 21st, 1879. The petition is in the usual form; and the answer a general denial, except the admission that defendant was in possession. The trial was before a jury, and the verdict and judgment were for defendant; to re-

verse which the plaintiff brings the case here by appeal. It was admitted on the trial that George Reiter was the common source of title; that the plaintiff is one of the only five equal heirs of one George F. Maus, who died intestate before the commencement of this suit; that plaintiff was a married woman at the time, but her husband was dead before the commencement of this suit; that defendant holds the possession; that the damages shall be \$1, the rents and profits \$2, per month. Plaintiff next read in evidence a deed from George Reiter and wife, to George F. Maus for the entire land, dated December 14th, 1864, which was in all respects sufficient to vest the legal title in him. This made out a *prima facie* case for plaintiff, and entitled her to the verdict and judgment.

For the purpose of showing this *prima facie* title out of plaintiff and in himself, defendant offered in evidence a deed from the admitted heirs of G. F. Maus, to Ursula Reiter, embracing the land in controversy, dated July 7th, 1866, and purporting to be acknowledged before C. H. Gordon, clerk of probate of Moniteau county, Missouri, on the day of its date. This deed is signed by plaintiff and her then husband, whose names appear on the face of the deed and in the certificate of acknowledgment, but the certificate of the notary entirely omits the privy examination of the plaintiff, thus rendering the deed void as to her. To remedy this defect the deed was sent to Gordon, who, on April 5th, 1871, indorsed a proper certificate upon it, containing the privy examination of plaintiff. This certificate recites the appearance of the parties as of the date of the deed. In the body he describes himself as clerk of the probate court; but the testimonium is as follows: "In testimony whereof I have hereunto set my hand and affixed the seal of said court this 5th day of April, 1871. C. M. Gordon, late clerk of probate court." This deed was objected to by plaintiff, because not properly acknowledged. The objections were overruled, and the deed admitted. Defendant then introduced a deed from Ursula Reiter and her husband to him-

self, dated October 22nd, 1874, for the land in controversy. No acknowledgment or certificate of record appears; but plaintiff saved no exceptions on these grounds.

Plaintiff, in rebuttal, offered evidence to show that she never was, at any time, subjected to a privy examination by Gordon. Defendant, also, offered parol evidence tending to show that the facts stated in the certificate of April 5th, 1871, were true. An agreed statement of facts was read in evidence showing that Gordon was not the clerk of the Moniteau probate court, at the time he attached the amended certificate to the deed in controversy, and did not pretend to be acting in any official character whatever in performing said act; but that he was such clerk at the date of the deed, and when he took the first acknowledgment.

The only question in this case relates to the validity of the amended certificate of acknowledgment, placed upon the deed from the heirs of G. F. Maus to Ursula Reiter, by Gordon, the former clerk of the Moniteau probate court, long after his official term had expired, and when he had no official authority nor any right to the custody or use of the seal. The facts surrounding this question are very plainly stated above, just as the record shows them, and need not be stated here; in fact, there is no dispute about them.

Respondent relies on the cases of *Wannall v. Kem*, 51 Mo. 150, and 57 Mo. 478. A critical examination of these cases will disclose that they do not satisfactorily decide the question in the form here presented. The case first cited was a bill in equity to foreclose a mortgage, executed by Kem and his wife, on lands belonging to the wife in fee, to secure a note alleged to have been executed by them to plaintiff's indorser, and to correct a mistake in the mortgage, the alleged mistake being in the omission of the notary to insert in his certificate of acknowledgment the privy examination of Mrs. Kem, although he had actually taken the same. The notary was made a party. The relief



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asked was a decree of the court correcting the alleged mistake. There was no amended certificate on the mortgage, and no prayer for a *mandamus* on the notary to put one there, and no such questions were before the court. There was a demurrer to the bill, because of its insufficiency, and because the notary was not a proper or necessary party to the suit. The real question in judgment was, whether a court of equity possessed the power to correct a mistake in the acknowledgment of a deed of a married woman for her fee simple lands; and this was the only question the court could legitimately decide under the issues. But Adams, J., in writing the opinion of the court, after holding that a court of equity possessed no such power, because it was a statutory power conferred upon the officer, departed from the case before him and remarked, somewhat *obiter*: "The officer may voluntarily correct his certificate, or make out a proper certificate where he has given a defective one, if the facts really exist to warrant such action. If the officer refuses to make a proper certificate, he may be compelled to do so by *mandamus*." It will be observed that no authorities are cited or reasons given why this should be so; and the remarks of the learned judge who wrote the opinion may be fairly classed as *obiter dictum*.

The second case cited between these same parties was an action on the note secured by the mortgage, which was given to one Brolaski, the plaintiff's indorser, for certificates of stock in a gas works company. One defense was, that the note was secured by fraudulent representations as to the stock. Mrs. Kem interposed a separate defense to the effect that she never was, in fact, subjected to a privy examination by the notary. These issues were tried by a jury, who found for defendant. Napton, J., in disposing of some questions put to Mrs. Kem, while on the stand as a witness, tending to prove that she really knew the contents of the deed and really executed it voluntarily, etc., having been informed by her husband, comments on and explains the policy of our statute in requiring those facts

to be ascertained and certified by an officer, rather than proven before the trial courts, but does not mention the power of these officers to grant amended certificates where they have made defective ones. 57 Mo. 482. In explaining the verdict of the jury on Mrs. Kem's defense, the learned judge alludes to the history of these acknowledgments, and the previous proceedings in the case, and then alludes to the amended certificate thus: "This court, however, on a review of this case, decided that the courts had no power over such mistakes, but intimated that the notary—the officer who took the acknowledgment—might correct the certificate, if, in point of fact, this privy examination, explanation etc., had in fact been made. *Wannall v. Kem*, 51 Mo. 150."

It is a little remarkable that the real point in issue in the first case is classed as decision, while the point as to the power of the officer to grant the amended certificate is merely classed as intimation. After stating the fact that a perfect certificate was substituted for the original, which was erased, long after the acknowledgment, he remarks: "If we assume this last certificate as true, and stating the facts as they occurred, it is plain that the notary, at the date of his examination and certificate, was perfectly aware of what was required by the statute." The effect this strange conduct of the notary might have had on the minds of the jury, in producing a verdict for Mrs. Kem, is then commented on. The defense was finally disposed of on the ground that there were no improper instructions, and the verdict was conclusive on the facts. 57 Mo. 483, 484. The sixth instruction given by the court explains the probative force of the amended certificate, as *prima facie* true, and tells the jury to find a verdict against Mrs. Kem on it, provided they also find a verdict against Kem on his defense of fraud, and she has not disproven the certificate. 57 Mo. 487. The remainder of the case contains a learned discussion of Kem's defense of fraud, which is finally disposed of on the strength of the verdict of the jury.

These cases furnish the only foundation, in this State, for the doctrine that an officer, even while yet an officer, may amend his certificate of acknowledgment to the deed of a married woman for her fee simple lands, after he has delivered it to the grantees, with a defective certificate indorsed. It is not difficult to perceive that the doctrine rests on a slim foundation, so far as direct adjudication is concerned, when so eminent a jurist as Judge Napton could only speak of it as having been intimated by this court. Counsel for respondent have been unable to furnish us any other authority on the subject, and we presume they are possessed of no more.

These cases certainly furnish no authority for extending the doctrine sought to be maintained by them, to a person who was an officer when he made the defective certificate, but had long ceased to be such officer, and was acting in a strictly private capacity when he made the amended certificate, as was the fact in the case at bar. In the *Kem cases* the notary was still in office, surrounded by the sanctity of his official oath, deterred by the penalty of his official bond, and resting under the fear of punishment for official misconduct. These are the safeguards which the statute has, in the wisdom of its policy, thrown around the estates of married women, and the courts have jealously guarded and protected them in the construction and enforcement of the statute, as the adjudicated cases will plainly demonstrate.

These facts were not present in this case when Gordon attached his amended certificate. He made no pretense of any official capacity, but only assumed to act as a private individual in performing an act which should have been done under the seal of official sanctity. What right had he to imprint the official seal of the court, which had passed into the custody of another, who was alone empowered to imprint it, on any legal document? Suppose he had made a false certificate, as it is alleged he did, where is the protection of the plaintiff on his official bond, or her right to

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subject him to criminal punishment for official misconduct? What becomes of the policy of the statute and the entire system inaugurated by the legislature in the laws requiring the execution of deeds to be established under the official protection of officers and courts designated for the purpose, if "late" officers after they have become private individuals, may perform these functions, imprinting official seals to which they have no longer any right, invading offices over which they have no official control to procure them for use, and acting without any legal sanction whatever? We have carefully examined this question, and are all decidedly of the opinion that to extend the doctrine intimated in the *Kem* cases, beyond the official term of the officer performing the original act, so as to sustain the certificate before us, would result in the utter subversion of our entire system for the execution of deeds, especially with reference to the fee simple lands of married women, and establish a precedent that would prove pernicious in its results. All the cases in other courts which we have examined are strongly opposed to the doctrine in any form. See *Bours v. Zachariah*, 11 Cal. 281; *Silliman v. Cummins*, 13 Ohio 116; *Merritt v. Yates*, 71 Ill. 636; *Ellwood v. Klock*, 13 Barb. 50; *Jourdan v. Jourdan*, 9 Serg. & Rawle 269.

For the reasons stated, the judgment should be reversed and the cause remanded. All concur.

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FUNKHOUSER, *Appellant*, v. LAY.

1. **Fraud.** Fraud may be inferred; but this does not mean that it may be assumed. It can only be legitimately inferred from some tangible, responsible fact in proof. It is a deduction which an intelligent mind may honestly make from the incidents and circumstances surrounding the case, and which appear to be inconsistent with good faith and rectitude on the part of the actor. If, however, his conduct and the transaction under consideration reasonably con-

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- sist as well with integrity and fair dealing, the law rather refers the act to the better motive.
2. ———: INTERVENTION OF BONA FIDE PURCHASER. If a fraudulent grantee of the equity of redemption of land covered by a *bona fide* mortgage buy at the mortgage sale, he will acquire a title free of taint.
  3. ———: ———: NOTICE. It is a general rule of equity that a purchaser with notice may protect himself by buying the title of a *bona fide* purchaser without notice.
  4. **Vendor and Vendee: PURCHASE OF ADVERSE TITLE.** A vendee may buy up a title antagonistic to that of his vendor, and set it up to defeat that of his vendor or his vendor's representatives.
  5. **Case Adjudged.** The principal purpose of this suit was to have one of the defendants declared a trustee for plaintiff of certain land lying beyond the limits of this State. The land was subject to a mortgage, the *bona fides* of which was not questioned. Before the trial, without any collusion on the part of this defendant and without any effort on the part of the plaintiff to prevent it, the mortgage was foreclosed, the mortgagee becoming the purchaser. This defendant then died and the suit was revived against her executor. *Held*, that plaintiff was not entitled to have him declared a trustee.
  6. **Practice: JUDGMENT.** In an action by a judgment creditor against the debtor and a third party to enforce a trust against the latter as a means of obtaining payment of the judgment, it is no error to refuse the plaintiff a new money judgment against the debtor.

*Appeal from St. Louis Court of Appeals.*

AFFIRMED.

*E. McGinnis* for appellant.

*Cline, Jamison & Day* and *M. L. Gray* for respondents.

PHILIPS, C.—This is an appeal from the St. Louis court of appeals. The facts as disclosed by the pleadings and proofs are substantially these: On the 30th day of March, 1877, one Thomas J. Pickering obtained judgment in the circuit court of the United States for the eastern district of Missouri, against the defendant John F. Lay for \$8,670.48, on which was collected, under execution, the sum of \$69.33, and the execution returned not satisfied as to the balance.

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John F. Lay then was and yet is a resident of the state of Illinois. In 1876 he owned certain real estate in said state. The said judgment was assigned by Pickering to plaintiff Funkhouser, who brought suit thereon against John F. Lay in Illinois on the 2nd day of October, 1877, which suit stood until the 14th day of February, 1879, when plaintiff voluntarily dismissed the same. On the 14th day of February, 1876, John F. Lay conveyed said land to one Drury in trust for one John E. Hayner to secure the payment of \$4,000, money then borrowed of Hayner by John F. Lay; the note was payable three years after date, with interest payable semi-annually at ten per cent, with the provision in the deed of trust that if the interest was not paid when due the whole debt should become due and payment be enforced by sale by the trustee. In July, 1876, John Lay and wife conveyed said land to one Drummond, who shortly afterward conveyed the same to said John Lay's wife. In October, 1877, John Lay and wife conveyed the land to the defendant Charlotte Lay, who is the step-mother of John Lay. The consideration of this last deed is expressed to be \$3,000 and subject to said deed of trust to Hayner. On March 28th, 1878, said Hayner, pursuant to the provisions of said trust deed, on default of payment of interest, had said land sold. The defendant Charlotte, through said Drummond, became the purchaser at the price of \$4,600. She paid the costs and expenses of said sale, the accrued interest on the mortgage debt, and \$100 of the principal, and received from the trustee a deed. On the same day she executed to said Hayner a deed of trust on said land to secure the payment of said \$3,900, balance of purchase money. In August following, said Charlotte conveyed said land to Lizzie Lay, wife of said John Lay. This was a quit-claim deed, consideration \$2,000, and the \$3,900 debt to Hayner. On the 8th day of February, 1879, said Hayner caused said land to be again sold under his second deed of trust for non-payment of interest, and received a deed therefor.



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The plaintiff brought this bill in equity setting up the foregoing facts, averring that all of said conveyances among the Lays and to Drummond and by Drummond to Mrs. Lay were fraudulent contrivances on the part of John Lay to defeat the collection of the Pickering debt, and that Drummond and Charlotte Lay were in all of said transactions actively aiding and abetting said John in said fraudulent attempts. No attack is made upon the integrity of Hayner's deeds of trust. The object of the petition is to charge Charlotte Lay as a trustee for plaintiff, and to have the value, rents and profits of said lands subjected to the payment of plaintiff's judgment, and to obtain judgment against John Lay for the said debt. The answer tendered the general issue. The multiform conveyances of the land in Illinois, to and fro among the family relatives of John Lay, with the attendant facts and circumstances in evidence, are such as to impress the mind very clearly with the belief that they were fraudulent as to the creditors of John Lay. And if the title acquired by Charlotte Lay had no other foundation than these family transfers, I should have no difficulty in deciding that she was a purchaser without consideration, and held the property in trust for the benefit of plaintiff as a creditor of John Lay.

But the circuit court and court of appeals evidently placed their ruling, in finding for defendants, on the ground that Charlotte Lay was an innocent purchaser, by reason of her purchase under the Hayner deed of trust. The learned judge, who wrote the opinion of the court of appeals, held that "the fact that Charlotte Lay paid no consideration for the equity of redemption, and that the conveyance by which she acquired it, was open to attack, did not deprive her of the right which she had, in common with the entire community, of purchasing at the trustee's sale." This position is assailed by plaintiff's counsel, with so much earnestness and plausibility, as to render it respectful, if not necessary, to re-examine more fully the correctness of that opinion, and the logic and authority of the appellant's opposition to

it. The argument against its validity may be summarized in the following propositions: 1st, That from all the facts and circumstances surrounding the purchase under the trustee deed and sale, Charlotte Lay did not design to acquire any adverse title to John Lay, but that her purchase was really made in his behalf; so that she continued to hold the title so acquired in secret trust for him; 2nd, That Charlotte Lay, by reason of her pretended ownership of the equity of redemption, was enabled to deter bidders at the sale, and thus to bid in the property for just the amount of the trust debt, as the presumption of outsiders would be that any surplus would go to the apparent owner of that equity; and that under the law the fraudulent holder of the right of redemption, cannot strengthen her title or throw off her character of trustee, by thus tacking on to her estate that of an innocent holder.

We will examine these propositions in their order.

The first involves mainly a question of fact. Does the evidence justify the conclusion that Charlotte Lay bought **1. FRAUD.** in under the trustee sale for the use of John Lay? Fraud, it is sometimes said, may be inferred. But this expression must not be construed to warrant the mere assumption of a fact. This inference can only be drawn legitimately from some tangible, responsible fact in proof. It is a deduction which an intelligent mind may honestly make from the incidents and circumstances surrounding the case, and which appear to be inconsistent with the good faith and rectitude of the actor. If, however, the conduct of the party, and the transaction under consideration, reasonably consist as well with integrity and fair dealing, the law rather refers the act to the better motive. The evidence fails to show with any degree of satisfaction, that Hayner, the owner of the deed of trust, acted in collusion with either John or Charlotte Lay. On the contrary, Hayner, who was examined as a witness on plaintiff's part, testified in effect, that he foreclosed his trust deed because of John Lay's failure to pay the accrued interest. This his

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deed authorized him to do. It does not appear that he even communicated, directly or indirectly, with John or Charlotte Lay about the intended foreclosure. He was not required to consult them by the terms of his mortgage. He gave notice by advertisement as his contract stipulated. The first notice John and Charlotte had of the proceeding was observing in the newspaper the advertisement. Thereupon Charlotte wrote to Drummond to buy in the property for her. This he did announcing the fact at the time the property was stricken off. She seemed to anticipate, that as Hayner was selling to compel payment of the past due interest, he would probably be satisfied with that sum and the payment of costs, etc. To that end she sent Drummond her check for several hundred dollars. Hayner was content to take this past due interest and costs and \$100 of the principal, all of which she then paid, and received a deed from the trustee, and at the same time executed back to Hayner her deed of trust to secure to him the \$3,900, balance of purchase money. There is nothing unusual or unnatural in all this arrangement. There is no evidence that John Lay furnished one dollar of the money paid out about that sale. Without more the presumption would be that Charlotte Lay, who was the active participant in the transaction, furnished the money. The only evidence directly touching this point is that of Charlotte Lay, who testified: "I paid all the expenses in money, and gave my own notes secured on the property." By the execution of her individual note to Hayner she became bound for the payment of \$3,900, which he might hold her other property for, if any she had.

In support of the second proposition, counsel is driven to assume the position that a grantee, who takes in collusion with a fraudulent grantor, where the  
 2. —: interven- sion with a fraudulent grantor, where the  
 tion of bona fide  
 purchaser. property thus taken is subject to an out-  
 standing mortgage debt, cannot, by buying the property,  
 under a foreclosure sale made pursuant to such mortgage,  
 acquire the title freed from liability to the claim of a cred-

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itor at large. I do not think the authorities cited and relied on sustain so broad an assertion. The rule is unquestionably, that a fraudulent grantee passes under the ban of the maxim: "He that hath committed iniquity shall not have equity." So, if A, in aid of a fraudulent scheme of B to cheat his creditors, takes a conveyance to B's property, though he subsequently does an act in amelioration of the condition of the property, such as repairing it and enhancing its value, or lifting from it an encumbrance, he will have no standing in a court of equity for re-imbursement for the outlay when called upon by the defrauded creditors of B to answer as a trustee for their benefit. This is the doctrine of the text in *Bump on Fraud. Con.*, 572.

The case of *Railroad Co. v. Soutter*, 13 Wall. 517, is consistent with this principle, and goes no further. The purchasers under the second mortgage there were held to have taken in fraud of the creditors of the company, who had brought a creditors' bill assailing the title of such purchasers. They bought subject to a prior mortgage. On the foreclosure of that precedent mortgage, and without sale thereunder, they saw fit to pay off the prior lien. They did not buy in under a foreclosure of the mortgage. When the creditors prevailed in their said bill, and obtained judgment, the fraudulent purchasers under the second mortgage, sought to be re-imbursed in the amount they had paid out in satisfaction of the prior lien. It was on this state of facts that Justice Bradley exclaimed: "Was it ever known that a fraudulent purchaser of property, when deprived of its possession, could recover for his repairs or improvements or for encumbrances lifted by him whilst in possession."

So in *Potter v. Stevens*, 40 Mo. 229, Stevens, though a purchaser for value, was not one in good faith. The notes executed by him for the purchase money, had been transferred to third parties by McDowell, the fraudulent grantor. When Potter, the defrauded creditor, sought to subject the property to its just liability for his debt, Stevens interposed

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the defense, and sought relief on the ground that he had paid a part of the outstanding notes. The court held there was no equity in the claim; that he stood in no better situation than if he had paid the whole of the purchase money to McDowell at the completion of his purchase.

In all such cases it will be observed that the grantee in fact is holding under the fraudulent grantor, and not under another purchase from or through an innocent purchaser.

This brings us to the consideration of another rule in equity: that a purchaser with notice may protect himself by purchasing the title of a *bona fide* purchaser without notice. 1 Story Eq., par. 409; *Halsa v. Halsa*, 8 Mo. 308; *Lemay v. Poupenez*, 35 Mo. 71. The reason of this rule is aptly expressed by Chancellor Kent, in *Bumpus v. Platner*, 1 John. Ch. 220, to be "to prevent a stagnation of property, and because the first purchaser, being entitled to hold and enjoy, must be equally entitled to sell." Hayner, as mortgagee, was a *bona fide* purchaser for a valuable consideration. He took long anterior to the judgment obtained by Pickering. The purchaser under that mortgage took whatever title John Lay, the mortgageor, had at the time of the execution of the mortgage, divested of all rights and interests derived from or through the mortgageor subsequent to the execution of the mortgage. *Mullanphy v. Simpson*, 4 Mo. 319; *Sims v. Fidd*, 66 Mo. 111.

Likewise may a vendee buy up a title antagonistic to that of his vendor, and set up this title to defeat that of his vendor, or his vendor's representatives. *Huth v. Carondelet M. R. & D. Co.*, 56 Mo. 206. If the purchaser under the mortgage acquires the right and character of the mortgagee, I am unable to comprehend how Charlotte Lay is to be affected with a trust to which the mortgagee was not subject. Had Hayner bought at the trustee's sale it would not be denied that he acquired the title freed from liability to plaintiff's debt. Had he thereafter sold to Charlotte Lay could it be said

that because she had fraudulently acquired the equity of redemption from the mortgageor, she could not buy under Hayner as an innocent purchaser? If so, what becomes of the doctrine that an innocent purchaser, as Hayner is admitted to be, "being entitled to hold and enjoy, must be equally entitled to sell" to whomsoever will buy?

But says counsel, Charlotte Lay, by appearing as the ostensible owner of the equity of redemption, was enabled to deter others from bidding at the sale, as the presumption would be that any surplus over the amount of the mortgage debt would go to her. This is more specious than real. Suppose she had not bid at all at the foreclosure sale, would not the presumption have been equally as strong that any surplus would go to her? In either case plaintiff had his remedy to reach such surplus. He could have sued by attachment and garnished the surplus fund, or followed it in equity with as much right as he pursues the remedy herein invoked. Plaintiff urges in answer to this that he did not then know the deed or claim of Charlotte was tainted with fraud. But as a matter of law he did have constructive notice. The alleged fraudulent deeds had been put to record, long prior to the trustee's sale. That imparted to the creditors of John Lay notice of the contents of those deeds. A cause of action then accrued to plaintiff, by attachment, or on his judgment in equity. And it was such notice, as from the date of recording the fraudulent deeds, put into motion the statute of limitation. *Rogers v. Brown*, 61 Mo. 195, 196.

There is too, another view of this matter which presents an insuperable objection to granting the relief sought. 5. CASE ADJUDGED. The land, alleged to be affected with the trust, is situated in the state of Illinois, a foreign jurisdiction. The courts of this State clearly have no jurisdiction to render any judgment *in rem* that will bind or affect this land. The judgments and decrees of local courts have no extra-territorial force. Story Conf. Laws, §§ 539, 543; *Smith v. McCutchen*, 38 Mo. 417. It may be conceded for



the purposes of this case, that a court of equity, having acquired jurisdiction over the person of defendant, might proceed to fix upon her the character of a trustee of this land for the benefit of the creditor plaintiff, and might make a decree *in personam* that would operate upon the conscience of defendant, and compel her thus to do justice and equity, under penalty of being dealt with as for a contempt. Perry on Trusts, 71, 72; *Burnley v. Stevenson*, 24 Ohio St. 478; *s. c.*, 15 Am. Rep. 621. When the amended petition was filed herein, on which the cause was tried, Hayner had foreclosed the deed of trust executed to him by Charlotte Lay, and had bought in the land and obtained a deed therefor. By this the land is lost to defendants as well as the plaintiff. This fact is in proof. Plaintiff has stood by and suffered the fee title thus to pass away, rather than pay off or take an assignment of this outstanding mortgage. What equity has he to demand that Charlotte Lay shall be held bound to him for the excess of the supposed worth of this land over and above the mortgage debt? No fraud or actionable wrong of hers occasioned this last sale. It was made in spite of her co-operation or dissent, by a party who had a right to sell. Charlotte Lay is now dead, and this action stands revived against her executor. Any decree which could be rendered against the executor could only be operative on the assets of the estate in the executor's hands. Under the law and the facts of this case no such decree ought to be rendered.

Plaintiff insists that at all events the circuit court erred in not giving him judgment against John Lay for the amount of his debt. The debt has already been merged into a judgment in the federal court at St. Louis, a forum selected by Pickering. Why ask for another judgment for this same debt—in an action, too, by the assignee founded on the judgment of the federal court? What business has the plaintiff in a court of equity to demand a mere judgment which he could have, if at all, in an action at law, and for which he had suit

6. PRACTICE: Judgment.

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pending in Illinois, the place of John Lay's domicile, when this action was brought? The process of the federal court is ample to enforce the collection of that judgment in this jurisdiction. In this respect plaintiff complains without injury.

The judgment of the court of appeals affirming that of the circuit court, which dismissed the petition, is affirmed. All concur.

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RANDOLPH, *Appellant*, v. MAUCK.

**An Appeal** must be perfected at the same term at which the court disposes of the motions for new trial and in arrest; no agreement of parties and order of the court will authorize an appeal at a subsequent term; the right of appeal depends upon compliance with the statutes.

*Appeal from Knox Circuit Court.*—HON. JOHN C. ANDERSON,  
Judge.

## APPEAL DISMISSED.

*Charles A. Winslow* for appellant.

*McQuoid & Balthrope* for respondents.

MARTIN, C.—It is impossible for us to consider the merits of this case, the appeal not having been perfected within the time required by law. There was a trial by jury and a verdict for the defendants at the December term, 1877, of the Knox county circuit court. At the same term and within four days the plaintiff filed a motion in arrest of judgment. These motions were by consent of parties continued to the June term, 1878, at which term they were overruled on the 7th day of June, 1878. At the time they were overruled the plaintiff, with the consent of defendants,

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obtained leave of court to file his bill of exceptions, affidavit and bond for an appeal at the December term, 1878, that being the next regular term of the court. The bill was not filed at that term, nor was the appeal then perfected by affidavit and bond in compliance with the agreement and order of leave. But at the said December term, the defendants consenting, the plaintiff obtained another order extending the time for perfecting his appeal by bill of exceptions, affidavit and bond at the next regular term of the court, being the June term, 1879. When the last mentioned term arrived the appeal was not perfected, but a similar agreement and order were entered extending the time for doing this to the next regular term, being the December term, 1879. At this last mentioned term the present appeal was allowed by the court, with bill of exceptions, affidavit and bond. A motion was made to dismiss the appeal upon the record as originally returned to this court, but, after the plaintiff applied for a *certiorari*, the motion was denied and the order granted. The return of the clerk to the order of *certiorari* makes the irregularity of the appeal more apparent than it was before.

These agreements and orders are insufficient in law to bring the case here by appeal for two reasons: 1st, An appeal must be perfected at the same term at which the court disposes of the motions for new trial and in arrest. The right of appeal depends upon the statutes, and they do not authorize an appeal at a subsequent term. It has been held that by agreement of parties and order of court a bill of exceptions can be filed in vacation, but no agreement or order will authorize an appeal to be granted at a subsequent term. 2nd, The agreement and order of extension of time for appeal, which were entered at the term at which the motions for new trial and in arrest were disposed of, were not complied with. The present appeal was allowed in compliance with an agreement and order entered three terms after the court had ceased to have any jurisdiction of the case.

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The appeal should be dismissed. PHILIPS, C., concurs; WINSLOW, C., not sitting, having been of counsel.

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THE STATE V. LEEPER, *Appellant*.

**Reasonable Doubt: INSTRUCTIONS.** The court instructed the jury that before they convicted defendant they ought to be satisfied of his guilt beyond a reasonable doubt. *Held*, that it was not for the defendant to complain that the court failed to add that such doubt ought to be a substantial doubt touching his guilt and not a mere possibility of his innocence. If defendant desired this addition to the instruction he should have asked for it.

*Appeal from Wayne Circuit Court.*—HON. R. P. OWEN, Judge.

AFFIRMED.

C. D. Yancey for appellant.

D. H. McIntyre, Attorney General, for the State.

PHILIPS, C.—The defendant, George W. Leeper, was indicted for selling liquor as a dramshop keeper on Sunday. The evidence fully sustained the charge. Defendant was found guilty and brings the case here on appeal. He complains of the following instructions given by the court of its own motion:

1. If the jury are satisfied from the evidence in the case, that defendant did, in Wayne county, State of Missouri, at any time within one year next before finding the indictment in this case, on the first day of the week, commonly called Sunday, sell any of the liquors described in the indictment, they ought to find him guilty, and assess his punishment to a fine of not more than \$50.

2. Before the jury convict the defendant they ought to be satisfied, beyond a reasonable doubt, that the defend-

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ant did, in Wayne county, State of Missouri, at some time within one year next before the finding the indictment, on the first day of the week, commonly called Sunday, sell liquor of some kind described in the indictment.

The first instruction is in common form and unobjectionable.

The criticism made by counsel on the second instruction is, that the court erred in directing the jury to acquit in case of a "reasonable doubt," without in explanation adding that "such doubt ought to be a substantial doubt touching the prisoner's guilt, and not a mere possibility of his innocence." In support of this somewhat novel position, for a defendant at least, we are referred to the case of *State v. Heed*, 57 Mo. 252. The syllabus would seem to justify the assumption of counsel, but an examination of the case will not. The first instruction given for the State is substantially the same as the one in question; and if there had been nothing more in the case there would have been no error. The vice was in the second instruction given for the State, in which the jury were told they could not acquit on "a mere possible doubt." Wagner, J., says: "It should have been followed by a more precise and accurate explanation of the terms, so as to have prevented misapprehension, as was done in the case of *State v. Nueslein*, 25 Mo. 111." Evidently this criticism referred to the second instruction, and not to the first. When the court undertook in that case to define what reasonable doubt was, it should have conformed to the principle laid down in the *Nueslein* case, instead of saying, as it in effect did, that it was not a mere possible doubt. There is nothing in the *Nueslein* case to support the idea that it is error to instruct the jury, that before they can convict, they must be satisfied beyond a reasonable doubt, of defendant's guilt. Such is the recognized rule in criminal practice. Its use in the form employed by the court in the case under review, is almost canonized. It has never been manifest to my mind that it is so liable to misunderstanding or confusion as the

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explanation in the *Nueslein* case. It is not unworthy of observation that the explanation given by the trial court in the *Nueslein* case, while sustained by the Supreme Court, did not wholly escape criticism on account of the employment of the word "substantial." The court say: "The instruction in relation to doubt is the law, although the word 'substantial' is seldom used in connection with it. It means a real doubt of defendant's guilt, not a mere possibility of his innocence. The common phrase is 'reasonable doubt' of the defendant's guilt. If there be such the jury must acquit. We cannot say that the jury were misled by the court informing them that the doubt must be a 'substantial doubt.'" From which it is manifest, that the learned judge, who delivered the opinion, would have been better satisfied had the instruction said: "It means a real doubt of the defendant's guilt; not a mere possibility of his innocence." The profession generally have regarded the explanatory or qualifying part of that instruction as less favorable to the defendant than the common phrase. It is, therefore, not to be maintained that the trial court erred against the defendant, because it did not of its own motion supplement the instruction with the explanatory clause. If the defendant really desired the assumed benefit of the enlarged instruction he should have asked for it. He cannot now be heard to complain of a reasonable doubt accorded him by the court, *ex gratia*, especially in a case where there was no conflict of testimony.

The indictment, under the authority of the decision in *State v. Nations*, 75 Mo. 53, is good.

Finding no error in the record, the judgment of the circuit court is affirmed. All the commissioners concur.



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The State ex rel. Griggs v. Edwards.

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THE STATE *ex rel.* GRIGGS V. EDWARDS *et al.*, Appellants.

1. **Pleading:** ALLEGATA ET PROBATA: ADMINISTRATOR'S BOND. In an action upon an administrator's bond, the petition alleged that, on a certain day, the administrator sold to a certain person, at public sale, cattle belonging to the estate to a certain amount, delivered the said cattle, but wholly failed and neglected to take from said purchaser a note with security, or any note whatever; that said purchaser had failed and refused to pay the purchase money, and, since said sale, had become wholly insolvent, so that said amount could not be collected from him; that said administrator never took any steps as such, as by law required, to secure the payment of the purchase money or collect same from purchaser. There was no demurrer to this petition, or motion to make it more definite or certain. Upon the trial, plaintiff offered in evidence a note payable to the administrator for the purchase money signed by the purchaser and others, and testimony that the makers of this note, when it was given, were insolvent. Defendant objected to this evidence on the ground that it was not admissible under the allegations of the petition. *Held*, that such allegations were sufficient to justify the admission of the evidence.
2. **Supreme Court:** REVERSIBLE ERROR. No judgment should be reversed unless there is error materially affecting the merits of the action.

*Appeal from Bates Circuit Court.*—HON. F. P. WRIGHT,  
Judge.

AFFIRMED.

*Bassett & Lashbrooke* and *T. J. Galloway* for appellants.

*Smith & Abernathy* for respondent.

WINSLOW, C.—This was a suit brought in the circuit court of Bates county, Missouri, by W. M. Griggs, as administrator *de bonis non* of the estate of S. M. Staley, on the bond of J. J. Miller, formerly administrator of said estate, to recover of said Miller and defendants, as his securities, the sum of \$825.20, for an alleged breach of said bond. The petition is in all respects formal, and alleges the following as a breach of the bond: "That on the 27th day

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of October, 1875, said Miller as said administrator sold to one James T. Williams, at public sale, cattle belonging to said estate, to the amount of \$825.20; that said cattle were delivered to said Williams, who received the full benefit of the same; but defendant Miller wholly failed and neglected to take from said Williams a note with security, or any note whatever; that said Williams has failed and refused to pay the said sum of \$825.20, and has, since said sale, become wholly insolvent, so that said amount cannot be collected from him; that said Miller never took any steps as administrator, as by law required, to secure the payment of said sum, or to collect the same from said Williams." Miller was not served and the suit was dismissed as to him. The answer of the sureties was a general denial. At the trial the plaintiff had judgment for \$743.87; to reverse which the defendants present the record to this court by appeal.

On the issues joined by the pleadings, "plaintiff offered evidence tending to sustain the issues upon his part," is the only statement of the bill of exceptions as to plaintiff's main evidence; and, as to the defendants', it is only stated that, "defendants offered evidence tending to prove the issues on their part." The record of the Bates county probate court, removing Miller and appointing plaintiff, was offered in evidence by the plaintiff, and objected to by the defendants, and the objections overruled; but counsel for appellants make no point in their brief upon this action of the court, and we, therefore, omit all further allusion to the subject herein, assuming that the question has been abandoned.

The only question in this case of any importance arises on the admission on the part of plaintiff, against the objections of the defendants, of certain evidence, in addition to the main evidence of plaintiff, which tended "to sustain the issues on his part," which appellants maintain was not admissible under the above quoted allegation, nor responsive to the issues made by the pleadings. This evidence is

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substantially as follows : A promissory note dated October 27th, 1875, payable to J. J. Miller or order, as administrator of the estate of S. M. Staley, for \$825, due twelve months after date, with interest from maturity at ten per cent per annum, signed by J. T. Williams, D. W. Morrill and Kasper Bauman. Wm. M. Griggs, the administrator *de bonis non* and substantial plaintiff here, was sworn and admitted as a witness, and permitted to testify to the following statements or admissions of Miller, the original administrator, as to the circumstances under which the above note was given : "Miller told me that he got this note from defendant, Edwards, and said he would not file it in settlement; that defendants, Wright, Sears, Edwards and Williams, told him, Miller, they wanted to put it in as a bad debt, and he, Miller, refused to do this, but said he would take it with him." Plaintiff then offered evidence tending to prove that the makers of said note were insolvent at the time the same was given.

### I.

Counsel for appellants in their abstracts of the record, which is substantially repeated in their briefs, state the legal effect of the allegations of the petition, above quoted, as follows : "The only breach alleged in the petition is that said Miller, as administrator of Staley, sold cattle, the property of said estate, on a credit of twelve months, and delivered the same to the purchaser without any note to secure the payment of the purchase price." This is manifestly a clear misconception of the petition and case, as it is presented by the record, and renders unnecessary any examination of the question, as to the variance between the allegation and the proof, on which appellants mainly rely. No demurrer was interposed to test the sufficiency of the allegation in question, but the objection was reserved until the introduction of the evidence under the pleadings, and as a ground for motion in arrest, and is so presented here by the record. The *gravamen* of the complaint in this case is,

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that Miller, as administrator of Staley, sold cattle of the estate, at public sale, the amount of which was lost to the estate by reason of his failure to perform his duties as administrator with reference to that sale. It is a conceded fact in the case that the complaint is literally true, and the record states that the plaintiff introduced evidence "tending to sustain the issues on his part." Appellants seek to narrow the issue by maintaining that the real charge is that the loss occurred on account of Miller's failure to take any note at all for the cattle, and that because evidence was admitted showing that an insolvent note was taken reversible error was committed. It is very well settled, in this State, that a party cannot allege one cause of action in his petition and recover on a different one made out by his evidence and submitted by his instructions. *Waldhier v. Railroad Co.*, 71 Mo. 514; *Edens v. Railroad Co.*, 72 Mo. 212; *Buffington v. Railroad Co.*, 64 Mo. 246; *Bullene v. Smith*, 73 Mo. 151; *loc. cit.* 162. But no such case is made on this record.

It should be borne in mind that the question does not arise here on a demurrer to the petition, or a motion to make it more definite and certain, in which the sufficiency of the allegations would come in question; but upon a demurrer to the evidence and on motion in arrest, in which the simple question is, whether there is any allegation at all to justify the admission of the evidence, or to render the petition good on general demurrer or after verdict. *Grove v. The City of Kansas*, 75 Mo. 673, and cases cited. Nothing can be clearer than that the allegations of the petition in question are sufficient to justify the admission of the evidence complained of. It is very clearly alleged that one of the reasons why the money was lost was Miller's failure to take "a note with security" from Williams for the purchase money of the cattle. Under the statutory rule for construing pleadings, which requires them to be "liberally construed with a view to substantial justice between the parties," (R. S., § 3546,) the above allegation may well be construed to mean "a note with sufficient

security; and this seems to be what was intended by the pleader; because he follows it up with the allegation that Miller failed to take "any note whatever;" evidently having in view the contingencies, that the note in evidence was taken as a sale note and was insolvent, or that it was taken as an outside note, as indicated by Miller's statements. Considering the manner in which the question is presented, the evidence complained of was properly admitted under this allegation alone. At least its admission does not constitute reversible error, in view of the fact, conceded in the record, that plaintiff made out his case by other evidence, not objected to, and that the judgment is substantially just and for the right party.

But there is another allegation in direct connection with the one just considered, which in connection with that allegation and the entire scope of the alleged breach, tends strongly to justify the admission of this evidence. It is distinctly alleged "that said Miller never took any steps as administrator, as by law required, to secure the payment of said sum." Here is an allegation of an utter failure to secure the payment of this purchase money in any manner, as required by the statute, in accordance with his official duties, as one of the reasons why it became lost to the estate. What has been said with reference to the other allegation may be applied here, and nothing further need be added on the subject, except to say that the statute very plainly defined Miller's duties in the premises; and the authorities just as plainly fix the liability of his sureties for his failure to comply therewith. R. S., § 111. It was made his express duty, under this section, to "take bonds or notes, with good security, of the purchaser."

## II.

It is objected that certain admissions of Miller were admitted in evidence without anything to show that they formed a part of the *res gestae*, which should have been excluded. It is a sufficient answer to this objection that the

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appellants have so meagerly preserved these statements in their bill of exceptions as to render it almost impossible for us to say just what they amount to, or what material connection they have with the real issues in the case. It does not even appear when they were made. A great deal of evidence seems to have been omitted, and very liberal general statements and concessions substituted. Under these circumstances it is difficult for us to intelligently examine the question, and the presumption must be indulged that the trial court acted right in the premises. Besides, the record so plainly shows, in every manner possible, that the plaintiff had already made out his case by an abundance of other evidence, that it is not possible to perceive how the meager and indefinite statements of Miller which the appellants have seen fit to preserve in the record could have had any misleading effect on the case, and the court, by instructions numbered seven and eight in the record—one in appellants' abstract—given for defendants, so plainly told the jury that these statements, and other kindred evidence, not preserved, tended to fix no liability on defendants, as to practically withdraw them from their consideration. In view of these considerations, the admission of this evidence furnishes no substantial ground for reversing the judgment—the error, if any, was thus rendered harmless—and it is the written law of this court that no case shall be reversed unless there is error “materially affecting the merits of the action.” R. S., § 3775.

### III.

On the evidence presented, the court, of its own motion, instructed the jury as follows :

1. If the jury find from the evidence that the said John J. Miller, as administrator of the estate of said Staley, at his administrator's sale of the personal property belonging to said estate, sold a lot of cattle belonging to said estate to said Williams on a credit of twelve months, it was the duty of said administrator to have taken a bond



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or note of said purchaser for the amount from said purchaser with good and sufficient security for the payment of the same when it should become due, at the time or before the delivery of said cattle, and if he failed to do so, and in consequence of such failure there has been a loss to said estate, and a failure to collect the amount due and any part thereof remains unpaid, then said securities are liable."

2. The words "good security" required by the statute contemplate that the persons acting as security shall own sufficient property, exempt from execution, to satisfy the note or bond, if the same is not paid by the principal; and even if the jury should believe from the evidence that said Williams, sometime after the sale, did execute and deliver to said administrator his note for the amount with security, yet if they further find that the said securities at the time had not sufficient property to satisfy the said note on the failure of Williams to pay it, and that in consequence of insufficient security the said amount of the sale of said cattle has been lost to the estate, then the said securities are liable for the amount of such loss.

The court also gave a general instruction for plaintiff, and refused two for defendants, the principles of which, so far as they contain the law applicable to the case, are embraced in those given by the court. Other instructions were refused for defendants, but no error is assigned on this action of the court. The instructions given by the court very fairly presented the case to the jury, and they could not well have misunderstood the issue they were trying; the verdict is manifestly right and just on the facts presented in the record; no substantial error appears for which the judgment should be reversed, and it should, therefore, be affirmed. All concur.

TURNER, *Plaintiff in Error*, v. STEWART.

1. **Injunction against Trespass.** To maintain injunction against trespass upon property real or personal, it is not necessary that the defendant should be insolvent or the wrong irreparable. The statute gives the right wherever an adequate remedy cannot be afforded by an action for damages. R. S., § 2722. Thus where the owners of a steamboat were in the constant habit of discharging freight at a private wharf, without the consent and against the protest of the owner of the wharf, thereby seriously interfering with his business of sawing, receiving and delivering lumber and ties, and they threatened to continue this practice; *Held*, that the wharf owner might maintain injunction.
2. **Trespasses on Realty: JURISDICTION: ADMIRALTY.** The State courts have jurisdiction of all trespasses committed upon real estate within the limits of the State. The fact that the real estate in question is a wharf does not make it a matter of admiralty jurisdiction and so cognizable alone in the courts of the United States.

*Error to Cole Circuit Court.*—HON. E. L. EDWARDS, Judge.

REVERSED.

*Belch & Silver* for plaintiff in error.

*Edwards & Davison* for defendants in error.

MARTIN, C.—This was a petition for an injunction, the substance of which we recite. The plaintiff states that he is the owner and in possession of a private wharf and landing on the west side of the Osage River; that he is engaged in operating a saw-mill and machine for loading and unloading cars with railroad ties, which mill and machine he has erected on said premises at great expense; that he is under contract to furnish and deliver a large amount of lumber to different parties, and that he has a large number of hands in his employment conducting his said business; that the defendants are the owners and proprietors of a steamer called the "Aggie;" that without the consent of plaintiff and against his notice forbidding it, said defendants

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have at divers times since the 7th day of May, 1880, landed their said steamer at said landing and discharged freight on said premises, and that they threaten to repeat and continue said unlawful acts and trespasses; that by reason thereof the business of plaintiff in sawing, receiving and delivering lumber, and loading and unloading railroad ties is wholly suspended and stopped during the time of said acts and trespasses; that defendants are in the habit of landing and discharging freight and thereby interfering with and suspending the said business of the plaintiff as often as two or three times each week, varying from a half to a whole day; that he is damaged to such an extent that an ordinary action at law would be a wholly inadequate remedy for the injury sustained, and that a continuation of said acts would work an irreparable damage for which a court of law provides no adequate remedy; wherefore the order of the court enjoining defendants from further trespasses aforesaid is asked by plaintiff, and such other and further relief as he may be entitled to.

To this petition the defendants filed a demurrer for want of facts sufficient to constitute a cause of action. It is urged that an injunction will not be granted to restrain trespasses unless the parties are insolvent or the injury irreparable. It is also insisted that the jurisdiction of the matter complained of belongs to the courts of admiralty and not to the State courts. The court sustained the demurrer and thereupon entered final judgment dismissing the petition, from which action of the court the plaintiff presents his writ of error.

It is not necessary that the defendant should be insolvent or the wrong irreparable to sustain the right to equitable relief against trespasses. It is provided in our statute that "the remedy by writ of injunction shall exist in all cases when an injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever, whenever in the opinion of the court an adequate remedy cannot be afforded by an

1. INJUNCTION VS.  
TRESPASS.

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action for damages." R. S. 1879, § 2722. The business of the plaintiff was constantly interrupted at the pleasure of the defendants. He was subjected to a grievance recurring at irregular intervals. His immediate damages would be difficult to estimate on account of the nature of his business. For consequential damages and loss of profits on his contracts it would be difficult if not impossible to obtain anything in an action at law. It is also clear that no single action for damages would afford him redress. He would have to sue for every time the defendants landed; and the burden of carrying on such a multiplicity of lawsuits would make his remedy about as grievous as the injury. Under this statute and the decisions construing it, I am satisfied the plaintiff was entitled to the remedy asked for, and that a suit at law would not be an adequate remedy. *State Savings Bank v. Kercheval*, 65 Mo. 682; *Damschroeder v. Thias*, 51 Mo. 100; *Echelkamp v. Schrader*, 45 Mo. 505; *Hayden v. Tucker*, 37 Mo. 214; *McPike v. West*, 71 Mo. 199; *Wright v. Moore*, 38 Ala. 593; *Watson v. Sutherland*, 5 Wall. 78.

On the second point of the demurrer there can be no doubt. The trespass was against real estate within the jurisdiction of the court. The judgment is reversed and the cause remanded. All concur.

2. THE TRESPASSES ON REALTY: jurisdiction: admiralty.

### EPPRIGHT, Appellant, v. NICKERSON.

1. **Corporation: ASSIGNMENT FOR BENEFIT OF CREDITORS.** An assignment of all the assets of an insolvent corporation for the benefit of creditors, if made by the board of directors without the consent of the stockholders, is *ultra vires* and void, but only as against the stockholders. A creditor of the corporation cannot make the objection.
2. ———: ———: **CERTIFICATE OF ACKNOWLEDGMENT.** To an assignment for the benefit of creditors executed by a corporation was appended a notary's certificate that M. C., president, and A. M., cash-

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ier, of the corporation, "acknowledged that they executed and delivered the same as their voluntary act and deed, for the uses and purposes therein contained." *Held*, that this was a sufficient certificate that the corporation acknowledged the instrument. *HOUGH*, *C. J.*, and *HENRY, J.*, dissented.

3. **Assignment: WHAT IT PASSES.** A deed of assignment which makes no reference to a schedule of assets accompanying it, will not be limited in its operation to the assets embraced in the schedule, but will pass any which come within its terms.
4. —: **LIABILITY OF STOCKHOLDERS MAY BE ASSIGNED.** An insolvent corporation may include in an assignment for the benefit of its creditors the liability of its stockholders for unpaid stock for which no call has been made.

*Appeal from Johnson Circuit Court.*—HON. NOAH M. GIVAN,  
Judge.

AFFIRMED.

*J. J. Cockrell and Peter E. Bland* for appellant.

*A. Comingo* for respondent.

**HENRY, J.**—This is a proceeding which was commenced in the Johnson circuit court against defendant Nickerson, by motion, under section 13, article 1, chapter 37, Wagner Statutes. Plaintiff obtained a judgment against the Warrensburg Savings Bank on the 21st day of February, 1880, and execution was issued on said judgment which was returned unsatisfied, and the motion was filed on the 26th day of August, 1880, after the return of said execution. Prior to the judgment in plaintiff's favor, in his suit against the bank, on the 24th day of January, 1880, the said bank by order of its directors made an assignment to Joseph Brown of all its "real estate, goods, chattels, effects and credits" for the use and benefit of its creditors, and said Brown duly qualified and entered upon the discharge of his duties as assignee. Nickerson, at the date of the return on the execution before mentioned, was a stockholder of the bank to the extent of twenty-eight shares, only thirty

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per cent of which had been paid, leaving seventy per cent unpaid, for which no call had been made by the directors. Brown on his application was made a party defendant to this proceeding and filed his answer alleging the facts in relation to the assignment, and claiming as assignee the unpaid balance for the stock subscribed by Nickerson, who in his answer also set up as a defense to the plaintiff's motion, said assignment. Several questions have been elaborately and ably argued by counsel, and we shall proceed to notice them in their proper order.

First, it is contended that the assignment was made by the directors without the authority of the stockholders and was, therefore, *ultra vires* and void. As to the stockholders, if they did not consent, this proposition we think correct. Field on Corp., § 151; *Abbott v. American Hard Rubber Co.*, 33 Barb. 580. In the latter case the question is elaborately and exhaustively considered, both by Sutherland, J., and Allen, J., and on this point we think it sufficient to cite that case and those relied upon by those learned judges in the opinions delivered by them. In the case at bar, no stockholder is complaining of the action of the directors, and the only stockholder who is a party to the suit relies upon the assignment to defeat plaintiff's recovery against him. It does not appear that the stockholders did not consent, nor that any of the stockholders ever complained of the conduct of the directors; and from their silence since 1880 their assent to the assignment may be reasonably inferred. The plaintiff himself proved his debt against the bank before the assignee.

It is also urged that the assignment was not properly acknowledged. The assignment and acknowledgment were as follows:

Know all men by these presents, That the Warrensburg Savings Bank, a corporation duly incorporated under and in pursuance of chapter 68 of the General Statutes of Missouri, and doing business in the town of Warrensburg, Johnson county, Missouri,

1. CORPORATION: assignment for benefit of creditors.

2. ———: ———: certificate of acknowledgment.



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in consideration of the sum of \$1 to it in hand paid by Joseph Brown, of the same place, does hereby bargain and sell, transfer and assign and deliver unto the said Joseph Brown, all and singular, the real estate, goods, chattels, effects and credits of the said Warrensburg Savings Bank, to have and to hold the same in trust to collect and receive the same, and dispose of it, and the proceeds to distribute under and in accordance with the general assignment laws of the State of Missouri among all the creditors of the said Warrensburg Savings Bank, in proportion to their respective claims. In witness whereof, the said Warrensburg Savings Bank has caused these presents to be signed and acknowledged by its president and cashier, and the corporate seal to be attached, this 24th day of January, 1880.

The Warrensburg (Corporate  
Seal) Savings Bank,  
Warrensburg, Missouri.

WILLIAM CALHOUN,  
President.  
AMOS MARKEE,  
Cashier.

STATE OF MISSOURI, }  
County of Johnson. } ss.

Be it remembered, That William Calhoun, president of the Warrensburg Savings Bank, and Amos Markee, cashier of the same, who are personally known to the undersigned, a notary public within and for the county aforesaid, to be the same persons whose names are subscribed to the foregoing instrument of writing, as parties thereto, this day appeared before me and acknowledged that they executed and delivered the same as their voluntary act and deed, for the uses and purposes therein contained. Given under my hand and notarial seal this the 24th day of January, 1880.

[L. S.]

S. J. BURNETT,  
Notary Public, Johnson County, Mo.

This presents a question of more difficulty. Section 354, Revised Statutes 1879, provides that every general as-

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signment by a debtor in trust for his creditors "shall be proved or acknowledged and certified and recorded in the same manner as is prescribed by law, in cases wherein real estate is conveyed." Section 743 of the statute in relation to private corporations, (R. S. 1879,) declares that, "It shall be lawful for any corporation to convey lands by deed sealed with the seal of the corporation and signed by the president \* \* and such deed shall, when acknowledged by such officer to be the act of the corporation, or proved in the usual form prescribed for other conveyances of land, be recorded," etc. In the *City of Kansas v. Hannibal & St. Joseph R. R. Co.*, 77 Mo. 180, the granting clause of the deed was as follows: "Know all men by these presents, that the West Kansas Land Company, by Solomon Houck, president, and Theodore S. Case, Secretary, \* \* has granted" \* \* . The attestation clause was as follows: "In witness whereof we hereunto subscribe our names and affix our seals this, etc.

SOLOMON HOUCK, President.

[SEAL.]

THEODORE S. CASE, Secretary.

[SEAL.]

W. K. LAND COMPANY.

[SEAL.]

[SEAL.]

The certificate of acknowledgment was that Houck and Case "acknowledged that they executed and delivered the same as their voluntary act and deed for the purposes therein mentioned." This court held the deed to be that of the company and the acknowledgment sufficient. In the case at bar the seal of the bank was affixed to the deed. The deed purports to be the deed of the bank. It is signed by the president and cashier, in pursuance of the order of the board of directors, the acknowledgment is the same as in the case above referred to, and upon the authority of that case must be held to convey the property embraced in its terms. Judge HOWEN and I dissented from the opinion of the court in that case, and speaking for myself I think that the acknowledgment of the deed in question does not meet

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the requirements of the statute. Judge HUGH is also of that opinion.

These preliminary questions disposed of, we are now to consider whether the deed of assignment, by its terms, embraced unpaid stock for which no calls had been made; and second, if embraced by the terms, was it in the power of the bank to assign such demands?

It is conceded by counsel for appellant, that the language of the conveyance is broad enough to include unpaid stock for which no call had been made (if 3. ASSIGNMENT: what it passes. assignable) unless the scope of the language is limited by the schedule attached to the deed of assignment. The deed does not convey the property by schedule. No reference is made to it, and under such circumstances, the express language of the deed is not restricted in its meaning by what the schedule contains.

Had the bank power to assign its claim upon a stockholder for unpaid stock, for which no call had been made 4. —: Liability of stockholders may be assigned. by the directors? A very able argument is made in Mr. Bland's brief in support of the proposition that such credits form no part of the general assets of a corporation, and are not properly the subjects of assignment.

*Ex parte Stanley*, 4 DeG. J. & S. 407, cited and relied upon by him as a direct authority, turned upon the construction of a deed of settlement, one clause of which provided that the board of directors might borrow any sum or sums of money for the use of the society on the security of its funds or property, and cause the funds or property on the security of which any sum or sums should be so borrowed or taken up, to be respectively assigned, etc., as the case might require, by way of mortgage to the person lending the money. Under that clause the directors assigned all and singular the capital stock, moneys, estates and effects of the society as security for the repayment of the loan. Lord Justice Bruce said: "In my judgment, so to construe the deed of settlement as that it should warrant

such an assignment as that, would be to authorize a plain breach of trust and an act inconsistent with the continuance of this society, and inconsistent probably with the lawful exercise of the powers of the directors." Lord Justice Turner observed in the same case that: "Upon the true construction of this deed of settlement the subscribed capital not paid up, does not constitute funds or property of the society within the meaning of the deed." What he subsequently says with respect to the assignability of unpaid calls due from the subscribers has relation to their assignability to an individual as security for or in payment of a debt. That was not the case of a general assignment by an insolvent corporation for the benefit of creditors.

*In re Sankey Brook Coal Co., L. R., 10 Eq. Cas. 381,* was similar to the case of *Ex parte Stanley, supra,* and turned upon the construction of a power given to "pledge, mortgage or charge the works, hereditaments, plant, property and effects of the company" in order to secure the repayment of moneys borrowed; and it was held that under the power the proceeds of a call already made but not yet paid, might be charged, but not the proceeds of a future call. To the same effect is the *Ohio Life Ins. Co. v. Trust Co., 11 Humph. 1.*

Appellant contends that unpaid stock for which no call has been made, which has been subscribed for under a statute providing that ten per cent of the nominal value shall be paid presently, and the balance on such calls and terms as the directory may from time to time prescribe, is not a debt *in esse*, but that a call is a condition precedent, and until made it is an obligation *in posse* merely, and makes an able and plausible philological argument based upon the definitions of Bouvier, Burrell, Abbott and Wharton of "*debitum in praesenti solvendum in futuro.*" They all define it substantially as "a debt due at present to be paid in future," which is but a translation of the phrase.

What is unpaid stock for which no call has been made, if not a debt? The obligation to pay it is assumed when

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the stock is subscribed for, and, that it is only payable on call, does not make it an obligation *in posse* merely. The contract of the indorser of negotiable paper is to pay if the maker does not on presentment and demand, provided due notice be given him of his default. Is it any the less a present debt, because not payable unless demand is made and payment refused, and notice given? If these things are omitted, he is absolutely discharged by the law merchant, and yet it is a debt of the indorser, although by neglect of the holder he may never be liable to pay it. The authorities are innumerable which hold the capital stock paid and unpaid a trust fund for the benefit of the creditors; and in the case of an insolvent bank, if the directors refuse or neglect to make the call for unpaid stock, a court of equity may compel the call. This is conceded by Lord Justice Turner in *Stanley's case*, *supra*, relied upon by appellant's counsel. In *Sagory v. Dubois*, 3. Sandf. Ch. 466, the court says: "Defendant by subscribing stock became liable to pay shares in full when called for by the directors. He might be compelled to pay by the receiver, who represented the creditors of the company, notwithstanding the directors had not only failed to call for unpaid balances, but had formally resolved that no further calls should be made."

The statute of this State under which this proceeding is allowed against a stockholder, recognizes the unpaid stock although no call has been made by the directors, as a debt due the company. Upon no other principle can the statute stand. The legislature has no power to establish the relation of debtor and creditor between two citizens. If, before the act was passed the stockholder, as to unpaid stock, was not a debtor to the bank, the statute could not make him such. He became such by his subscription, and to hold that the corporation, by neglecting or refusing to make calls for unpaid stock, can release the stockholder from his liability, would be to allow them to do indirectly

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what they could not accomplish by a resolution of the board, directly absolving him from his obligation.

We are of the opinion that it was within the power of the bank to assign the credits in question, and think we are fully sustained in this conclusion by the cases of *Terry v. Anderson*, 95 U. S. 628, and *Marsh v. Burroughs*, 1 Woods 463. In this case Bradley, J., observes: "It is contended that the unpaid subscriptions of capital stock are not assets for the payment of debts, either legal or equitable; that they exist merely as possibilities; that they are not a debt due, having never been called in; that no one can call them in but the directors; and in them it is a mere discretionary power which cannot be exercised either by the assignee, the receiver or the court itself, and cannot be assigned. This position may be somewhat plausible, but it is not sound. It is not a mere power vested in the bank to make further calls. It is a right; and when a debtor has such right and does not choose to exercise it, equity at the instance of creditors will exercise it for him." *West Chester R. R. Co. v. Thomas*, 2 Phila. 344; *Lionberger v. Broadway Savings Bank*, 10 Mo. App. 499. We have thus particularly noticed the case in 1 Woods because appellant's counsel have cited and rely upon it as authority in support of their views. In addition to these express authorities all those cases are in point which hold that the capital stock of a corporation is a trust fund held by the corporation for the benefit of all its creditors. *Powell v. N. M. R. R. Co.*, 42 Mo. 68; *Germanatown Pass. R'y Co. v. Fittler*, 60 Pa. St. 124; *Wood v. Dummer*, 3 Mass. 308; *Webster v. Upton*, 91 U. S. 65; *Sawyer v. Hoag*, 17 Wall. 621; *Sagory v. Dubois*, 3 Sandf. Ch. 466; 13 Wisc. 62; 2 Dill. 106. We might extend this list almost indefinitely, but the cases will be found cited in the elementary works.

The case of *Grosse Isle Hotel Co. v. L'Anson's Exrs.*, 13 Vroom (42 N. J. L.) 10, was a suit at law to recover money alleged to be due from the testator on a subscription for capital stock of plaintiff. No assessment of this stock had



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Shackelford's Administrator v. Clark.

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been made, and it was properly held that no suit at law could be maintained, until a call was made. Until then it was not payable. The same may be said of *Chandler v. Siddle*, 10 Nat. Bank. Reg. 236, and in fact that principle underlies nearly all the cases cited by the counsel for appellant. *Hannah v. Moberly Bank*, 67 Mo. 679, and other Missouri cases cited are to the same effect.

The judgment of the circuit court, which was for defendant, is affirmed. All concur.

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SHACKELFORD'S ADMINISTRATOR, *Appellant*, v. CLARK.

**Priorities between Partnership and Individual Creditors.** A creditor of one partner only, as to the separate property of such partner, has no priority over a partnership creditor, where there are no firm assets and the other partners are insolvent.

*Appeal from Clay Circuit Court.*—HON. GEO. W. DUNN, Judge.

AFFIRMED.

*Henry Smith and James T. Farris* for appellant.

*Simrall & Sandusky* for respondents.

MARTIN, C.—This was a suit for the foreclosure of a deed of trust, and was commenced in the DeKalb circuit court at the October term, 1878, and was thence taken by change of venue to the circuit court of Clay county. The deed was executed by Samuel P. Clark to Hugh J. Robertson, trustee, on the 7th day of September, 1871, for the purpose of securing the payment of four notes, one in the sum of \$980 executed by said Samuel P. Clark to Ryland Shackelford, the other three executed by Gilmer, Clark & Co., one in favor of John Lynn in the sum of \$1,000; one

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in favor of John Howdeshell in the sum of \$1,000, and one in favor of the Missouri City Savings Bank in the sum of \$4,000. The deed of trust provides that if said notes should not be paid when due, the trustee should sell "and receive the proceeds of sale, out of which he shall pay first the costs and expenses of this trust, and next the notes and interest on the same, and the remainder, if any, shall be paid to Samuel P. Clark, or his legal representatives."

These notes were all past due when the deed was executed. The land described in it was the individual property of Samuel P. Clark, the grantor in the deed. The note in favor of Ryland Shackelford was the individual debt of said Samuel P. Clark, and was given for money borrowed for his private use; the remaining three notes were the firm debts of the co-partnership of Gilmer, Clark & Co., a firm composed of John A. Gilmer, Samuel P. Clark and William Gilmer, all of whom are still living, and were given for money which went into the business of the firm. At the date of the execution of the deed of trust, as well as at the commencement of the suit, said firm was insolvent, and was possessed of no firm assets; each member of the firm was also insolvent. These facts all appear in the record, and in an agreed statement of facts. On trial of the case the court rendered a judgment or decree foreclosing the deed of trust, and directing the proceeds of the security to be applied on all the notes *pro rata*, after payment of costs. From this decree the case comes before us on appeal.

There is but a single question presented to us for decision, and that is the refusal of the court to adjudge a priority in favor of the Shackelford note, and its consequent action in adjudging that the proceeds of the sale be applied equally upon all the notes described in the deed in the ratio of their respective amounts. No principle in the law of partnership is better settled than that the creditors of a partnership have priority over the creditors of an individual member thereof in respect to the funds of the partnership.

*Phelps v. McNeely*, 66 Mo. 554; *Hilliker v. Francisco*, 65 Mo. 598. This principle rests upon the most persuasive and satisfactory reasons. Each partner has the right to appropriate or compel the appropriation of all the partnership assets to the payment of partnership debts. This right is conceded to him because he is personally bound for the payment of all such debts. He has the right to devote his partner's share of the firm assets as well as his own share, to the payment of the firm debts. Being bound for his partner's share of the firm obligations, as to such partner's share of the firm assets he occupies the relation of a surety, with the attending right to devote such share of the assets to the satisfaction of the share of debt which his partner ought to pay in order to relieve him from liability therefor, and to emancipate his interest in the assets from the risks of the adventure. This right of each partner has come to be treated in the courts as an equitable lien, possessed by him, upon the assets of the firm for the purpose of discharging its common liabilities. Thus possessed and exercised as it must be for the benefit of the creditors as well as the benefit of the partners, it is very properly regarded as an equitable lien existing in their favor. It certainly cannot be administered without inuring to their benefit and advantage, although it is worked out through the equity of the respective partners. The priority which results to partnership creditors rests upon this lien, and is so protected in law and equity that when the creditor of an individual partner obtains judgment and levies upon the assets of the partnership, the purchaser at a sale under the levy, in those states in which such levy is permitted, acquires only the interest of the judgment partner in the assets levied upon, subject to the payment of the partnership debts. *Wiles v. Maddox*, 26 Mo. 77.

From this priority of the partnership creditors upon the partnership funds, it does not follow as a logical deduction, that the individual creditors have priority upon the separate or individual funds, for the reason that no lien,

legal or equitable, exists in their favor against such funds—certainly not in the lifetime of the debtor or before his commercial death by bankruptcy. A separate creditor has nothing analogous to a lien, legal or equitable, on the property of his debtor during life; nor can anything of this kind be worked out for him, unless it has been given to him by some contract of the debtor, or has been acquired under some process or proceeding in the courts. I am aware that the priority contended for by appellant has been recognized and approved by high authority; but it has been generally applied, after death or bankruptcy, in the marshalling of assets. In England, where it has been approved at different times, no uniformity has been observed in its preservation or enforcement. In our own State it has never received any judicial sanction; and there would seem to be really no foundation for it under our statute, which declares the obligations of partners to be several as well as joint, so that the right of the partnership creditor to resort at once to the separate estate of the partner for satisfaction of a partnership demand is precisely the same which attends the enforcement of any other several demand. R. S. 1879, § 661; *Eaton v. Walsh*, 42 Mo. 272. It has long been settled in this State that if the demand of the creditor consists of a personal obligation, he is at liberty to enforce it against the general property of the debtor, notwithstanding he may be possessed of security specially pledged and bound for its payment. *Thornton v. Pigg*, 24 Mo. 249; *Kansas City Sav. Ass'n v. Mastin*, 61 Mo. 435. Demands against partners being several as well as joint, and the holders thereof being entitled to resort at once to the individual estate by suit against one partner alone, it is impossible to maintain that partnership demands are not contracted on the faith of the separate estate of the partners.

A familiar principle prevails in equity to the effect that where a creditor may resort to two funds for the payment of his debt, while another creditor can resort to only one of the funds the creditor having access to the two funds

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may be compelled to exhaust the fund not accessible to the creditor to whom only one fund is open before he resorts to the other fund. After such exhaustion he is then permitted to resort to the other fund equally with the other creditor. This principle does not depend upon any priority of lien or right recognized in law or equity, but exists in the absence of it. The debts may consist of several promises only, and be equally good against the fund subject to both, but the accident of one of the debts being good also against another fund, raises the equity of confining that debt in the first instance to that fund. I will not pretend to say under what circumstances this equity could be applied as between partnership and individual creditors, for the reason that no such case is presented in this record, there being only one and not two funds, out of which payment is to be made.

Having reached the conclusion that there is no priority in favor of the plaintiff's note, it is unnecessary to consider whether the language of the deed of trust relating to the application of the proceeds thereof would be sufficient to displace or control such priority. *Wilcox v. Todd*, 64 Mo. 388.

As the record is without error, the judgment should be affirmed, and it is so ordered. All concur.

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MEYER, *Appellant*, v. ROSENBLATT.

**Taxes:** INJUNCTION AGAINST COLLECTION. A petition to restrain the collection of taxes on the ground of excessive valuation showed that the plaintiff, believing all his property to be exempt from taxation, delivered no list to the assessor; but it did not show that the assessor failed to demand a list. *Held*, that it stated no ground for relief.

*Appeal from St. Louis Court of Appeals.*

**AFFIRMED.**

*I. T. Wise* for appellant.

*Leverett Bell* for respondent.

**HENRY, J.**—This is a proceeding commenced in the circuit court of St. Louis to restrain defendant, as collector of the city, from selling plaintiff's personal property for taxes assessed against him. The allegations in the petition are, that plaintiff never owned the property on which the taxes were levied, and that the valuation of the property was excessive, that he never delivered to the assessor a list of his property, consisting of household furniture only, believing it to be exempt from taxation. At the trial the circuit court held that the petition stated no case for the relief demanded, dismissed the bill and rendered a judgment for the defendant, which was affirmed by the court of appeals, and plaintiff has appealed to this court.

Whether the collection of taxes illegally levied can be enjoined, a question discussed in briefs of counsel, is not presented by this record. The petition contains no allegation to the effect that the property was illegally assessed or taxed. For an excessive valuation, or a levy of taxes upon property not owned by the party complaining, he has his legal remedy by appeal to the tribunal provided by law to correct such errors. The petition in this case alleges that plaintiff never delivered to the assessor a list of his taxable property, but does not allege that it was not demanded by that officer, and the allegation that plaintiff did not deliver it, is not inconsistent with the facts that the assessor demanded and plaintiff refused or neglected to furnish his list. The law under such circumstances authorizes that officer to ascertain, as he best may, the taxable property owned by the party, and place it upon his book for taxation, and from



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such, as from other assessments, the tax-payer has his appeal. Neglecting to avail himself of that remedy, he cannot resort to equity to enjoin the collection of the taxes. If this were permitted, the usefulness of the board of equalization or appeals would be destroyed, collectors would be hampered and hindered in the collection of the revenue, and the finances of the municipality thrown into inextricable confusion. This ought not to be tolerated, while an appeal to the board of equalization or appeals, furnishes an ample remedy for complaints of this character, which may be heard and determined in time for the body which levies the taxes, to ascertain upon what property and values they shall be imposed.

With the concurrence of all the judges the judgment is affirmed.

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CRAWFORD, *Plaintiff in Error*, v. ELLIOTT.

1. **Contracts, Construction of.** A contract which is not precise in its terms must be construed in the light of the facts and circumstances surrounding the subject matter it embraces.
2. **Case Adjudged.** A contract was made for the sale of the sound and dry corn in two cribs at a price seventeen cents below that of "No. 2 mixed corn" in St. Louis. It was provided that the corn should be kept dry so that shellers should have no trouble to keep the damaged separate from the dry and sound. Both parties knew that some was then damp. The seller reserved such as was damaged, and the purchaser agreed to shell and carry off the corn purchased at his own expense. In shelling the purchaser failed to separate the damp from the dry, and in consequence, some of the corn received in St. Louis did not grade "No. 2 mixed." *Held*, upon consideration of all the circumstances, that while the purchaser was not bound to take damaged corn, yet if he took it he was bound to pay for it at the price stipulated.

*Error to Pettis Circuit Court.*—HON. WM. T. WOOD, Judge.

REVERSED.

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*Geo. P. B. Jackson and O. A. Crandall* for plaintiff in error.

*Ryland & Ryland* for defendants in error.

MARTIN, C.—This was an action to recover of defendants, as partners, a balance of account due on a contract for the sale of corn. The contract was as follows:

“HUGHESVILLE, May 15th, 1876.

“This is a contract made by J. B. Elliott, of one part, and G. W. Crawford of the other part, as follows: I, G. W. Crawford, sell to Elliott all my crop of corn, except such as I may want for farm use, and the damaged corn, if any; corn to be sound and dry. The price to be at seller's option, inside of fifteen days from the time the corn is shelled, and to be made seventeen cents below what No. 2 mixed corn is worth in St. Louis, at the time the price is to be fixed; corn is to be kept dry, so shellers will have no trouble to keep damaged corn separate from the dry and sound corn. I, G. W. Crawford, acknowledge the receipt of \$500 as first payment on said corn. I, J. B. Elliott, agree to pay to Crawford as above stated for his corn crop, and shell it at Crawford's farm, and haul it to station at my own expense. I pay Crawford \$500 at this date, and then pay all balance when corn is shelled and price fixed. This corn is all to be weighed at the station, Hughesville, and paid for as per weight on scales at fifty-six pounds to the bushel, shelled. If any of this crop of corn grades No. 2 white mixed, in St. Louis, then Crawford is to fix price, as in No. 2 mixed corn, seventeen cents below St. Louis price. The price of said corn is to be made by the quotations made at the elevator that Elliott may ship to.

J. B. ELLIOTT,  
GEO. W. CRAWFORD.’

In the pleadings and on the trial it was admitted that

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defendants were partners doing business and dealing in corn under the name of J. B. Elliott, and that the contract sued on was a part of said partnership transactions. There was no dispute about the quantity of corn received by defendants under the contract, nor as to the amount of money paid to plaintiff, it being agreed that the corn amounted to 3,500 bushels, and the money to \$864.30. The plaintiff claimed \$87.05 as still due him under the contract, which the defendants refused to pay. They claim in their answer that some of the corn so received by them did not grade "No. 2 mixed," in St. Louis, and that they were compelled to sell it at a loss of \$87.05 in consequence of this fact, and that the amount to be paid plaintiff under the contract ought to be reduced in the amount of said loss, which, if done, would leave nothing coming to him. This difference has risen from the different constructions placed by the parties respectively upon the contract.

The trial resulted in a judgment for defendants under the construction placed upon the contract by the court in its instructions, which were as follows :

1. Under the contract sued on it was the duty of the plaintiff to deliver to the defendants none but sound and dry corn, and if he delivered to them corn not sound and dry, then as to such damaged corn, the plaintiff cannot recover in this action as for sound and dry corn.

2. If the court believe from the evidence that the corn was delivered to the defendants in such a damp and damaged condition, that by reason thereof, the price and value of the corn was reduced below the contract price to the amount of \$87.05, then the court will find the issues for the defendants, if the court should further find that defendants have paid plaintiff all there was due him under said contract.

3. Although the court may find from the evidence that defendants' employes shelled the corn in question, yet it was not the duty of the defendants under the contract to separate and select the sound and dry corn from the damp

and damaged corn, so as to render them liable for all the damaged corn they shelled and shipped, as if the same had been sound and dry.

It is for error in these instructions, which were given at the instance of the defendants, that the plaintiff prosecutes his writ in this court.

Whether the action of the court was correct in giving these instructions must depend upon the construction which should be given to the contract; and this is an undertaking not entirely free from difficulty and doubt. A contract of this character must be construed in the light of the facts and circumstances surrounding the subject matter it embraces. The corn was raised in 1875, and was on the plaintiff's farm in two cribs, each about thirty-two feet long by sixteen feet wide. One was inclosed with boards on the sides and ends about six inches apart, the other with rails, and both were covered with timothy and prairie hay. Elliott had seen the corn twice before the date of the contract with a view of buying it. He wrote the contract himself and testifies that he examined the corn before buying, and found both damaged and sound corn. It was shelled by one Rice as agent of defendants. Rice testifies that Crawford told him to keep the wet corn separate from the dry corn when shelling, and that he informed him that he had no time to attend to this instruction, and that it was not his place to do so. It seems that there was no rain to speak of during the shelling, but that the corn was not dry throughout. The plaintiff testifies that the corn was damaged and damp one foot in on the sides of the cribs. Four car loads were rejected in St. Louis by the inspector as damp, and the loss to defendants is claimed to have been suffered in these loads.

From the language of the contract and the circumstances surrounding the subject matter of it, it is evident that Crawford contracted to sell to Elliott all his crop of corn except such as he needed for farm use and such as was damaged. The corn thus contracted to be sold to him was

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the sound and dry corn of the cribs, and not the damaged corn. Elliott wanted only sound and dry corn, and did not want damaged corn. There was no representation or guaranty that any particular portion of the corn was sound or dry, or that any particular portion was damp or damaged; and consequently there was no warranty that any particular portion of it would grade No. 2 mixed or No. 2 white mixed. Both parties had seen and examined the corn in the cribs with a view to a sale, and from their own knowledge they must have been satisfied that the bulk of it would grade No. 2 mixed. The contract was evidently made upon this assumption, but it is an assumption arising upon the knowledge of both parties, and is not supported by any representation or warranty of the plaintiff. Nothing could grade No. 2 mixed which was not sound and dry. If there had been no corn of this grade in the cribs, or no more than the plaintiff required for his farm use, there would have been no subject matter for the contract of sale to take effect upon, and nothing could have passed to the defendants under it. The transactions would have been as null as the sale of a horse which both parties supposed to be living at the time of the sale but which proved to be dead.

Elliott was not bound to take anything but No. 2 mixed or No. 2 white mixed, which implied that it was to be sound and dry, and which the contract provided should be sound and dry; and Crawford was not bound to sell him anything else, and not even all of that, having the right under the contract to retain out of the cribs enough for farm use. That the bulk of the corn was expected to grade No. 2 mixed, and that the contract of sale applied to that grade, seems very apparent from the clause in the contract which provides that "if any of this crop of corn grades No. 2 white mixed in St. Louis, then Crawford is to fix price as in No. 2 mixed corn, seventeen cents below St. Louis price." No. 2 white mixed is known to be a grade a little above No. 2 mixed, being composed of about seven-eighths white corn, which is adapted to the manufacture of meal. Al-

though some of the sound and dry corn should exceed the grade of what the bulk of the crop was taken to be, nevertheless it was to be paid for at the same price. Crawford had a range of fifteen days after the corn was shelled to fix upon the prevailing price at St. Louis for No. 2 mixed. He was not bound to wait for shipment to St. Louis or elsewhere.

The corn was to be kept dry until shelled so that the shellers would have no trouble to keep the damaged corn separate from the sound and dry corn. I do not understand that the damaged or unsound corn was to be shelled at all. The parties to the contract evidently assumed that without more rain upon it the shellers would have no trouble in separating the damaged from the sound and dry corn. A dampening of the corn by rain would greatly increase the labor of separating the sound and dry corn from the corn so damaged by the rain, for the reason that a simple dampening does not produce any visible change in it at once, but only after the lapse of time. The corn purchased by Elliott was to be shelled by him, and the labor of separating damaged from sound and dry corn is expressly recognized as belonging to the shellers. Elliott seems to have regarded the task of shelling the corn as imposed upon him by the contract, and he undertook to perform it. But it seems that Rice, whom he hired to do the shelling, did not regard the labor of separating the corn as belonging to him in his contract with Elliott, and the result of an improper mixing of sound and dry with damaged corn is admitted by him in his evidence.

I think it more than probable that the depreciation complained of was caused by a want of care in separating. All that was done in this behalf was done by Rice who repudiated the obligation and admitted a partial non-performance. Delivery under the contract did not contemplate any distinct or formal act of Crawford. Possession of the corn was given to Elliott for the purpose of separating and shelling the corn contracted for. In separating and shell-



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ing he exercised his own judgment in determining what came to him under his contract, and what did not so come to him. What he separated and shelled presumably belonged to him under the contract, and the title was perfected in him as soon as he had done this, in the absence of any objection on the part of Crawford or any refusal on his part to take what he had separated and shelled.

Under our construction of the contract the foregoing instructions were erroneous. Elliott was not bound to accept or ship any damaged corn. The duty of separating and shelling being performed by him, he ought to have separated, shelled and shipped only dry and sound corn. He had no right under his contract to take anything else. Crawford had the right to assume that all the corn which he took was taken under the contract. Nothing to the contrary was intimated by Elliott. No standard of payment is provided for anything else. If the depreciation resulted from negligence in separating, or if he took corn which turned out to be somewhat damaged by dampness, he has no valid claim for reclamation now, having taken the corn upon his own judgment as under the contract without objection. He had no right to take damaged corn under his contract, which had but one price for what was sold in it, and afterward insist on abandoning the contract price, and claim the right to pay what it was worth. The right to keep the damaged corn and to dispose of it to the best advantage, belonged to Crawford and not to Elliott. There is no evidence of fraud or negligence on the part of Crawford. There is evidence of negligence on the part of Elliott in the matter of separating the sound and dry corn from the damaged corn. Under the evidence contained in the record, it is our opinion that Elliott was bound to pay the contract price for all the corn taken by him. And as the amount of difference is small, and the case was tried by the court without the aid of a jury, we do not think it necessary to send the case back for a retrial, but will order an entry by the circuit court of the judgment which should

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have been rendered. Accordingly the judgment of the circuit court is reversed, and the case is remanded with directions to enter a judgment in favor of plaintiff in the sum of \$87.05, with interest thereon from the commencement of the suit to the date of the judgment, and for costs. WINSLOW, C., concurs; PHILIPS, C., not sitting, having been of counsel.

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BENSON V. THE CHICAGO & ALTON RAILROAD COMPANY, *Appellant*.

1. **Excessive Verdict.** Where the verdict is manifestly excessive in amount, this court will reverse the judgment.
2. **Measure of Damages in Action for Flooding Land.** In an action on the case for flooding land the plaintiff can recover only the damages done up to the institution of the suit. It is, therefore, error to instruct the jury that the proper measure of damages is the difference between the market values of the land immediately before and immediately after the flooding took place.
3. **Diversion of Water Courses—of Surface Water.** The authorities are generally agreed against the right of one proprietor to divert a natural water course, so as to throw the water upon an adjacent proprietor to his injury; and in this State the law seems to be settled that in respect even to surface water the dominant proprietor has no right, in diverting it, to obstruct its course by collecting it together, as in artificial ditches, and conduct it to and discharge it upon the servient land in increased volume.
4. **Railroads: EASEMENT: FLOODING ADJACENT LAND.** The grant of a right of way to a railroad company carries with it the right to make the necessary embankments, culverts and ditches, for the proper grade and protection of the road; and if in exercising this right with due care and skill the flow of surface water from adjoining land of the grantors is obstructed, it is *damnum absque injuria*.
5. **Instructions** should be framed solely with reference to the issues made.
6. **Water Course.** The ordinary flow of surface water does not constitute a water course.

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*Appeal from Lafayette Circuit Court.*—HON. WM. T. WOOD,  
Judge.

REVERSED.

*Walker & Reed* for appellant.

*Hall, Young & Wilson* for respondents.

PHILIPS, C.—This is an action to recover damages resulting from turning the flow of water from its natural course on to the lands of respondent by appellant. The petition states substantially that plaintiffs owned certain lands on the line of defendant's railroad; "that on or about the 1st day of July, 1878, defendant built and constructed said railroad through and across said real estate, and through and across lands east of and adjacent thereto, and in building and constructing the road-bed of said railroad, defendant failed and neglected to provide and construct proper openings and water-ways through the said road-bed, but did so construct and build the same that the drainage from the surface of and the water flow from a large scope of country to the east of said real estate, which by its natural course and channels did not flow over the said real estate, was diverted from its natural course and channels and turned and directed so as to flow over and through the land of plaintiff, (describing it,) through an opening and culvert in said road-bed, built and constructed by defendant, near the eastern boundary of and upon said real estate, to plaintiff's damage in the sum of \$600." There was a similar count for damages alleged to have been caused by the flow of water coming from the west, but as that issue was found for defendant no further notice need be taken of it.

The answer tendered the general issue as to the trespass, and for special defense alleged that the railroad company known as the Lexington, Lake & Gulf Railroad Company, built the road-bed in question, with the sanction

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of and license from the plaintiffs, evidenced by a deed of conveyance therefor, dated August 28th, 1871, duly acknowledged and recorded, by which they conceded to said railroad the right of way over said lands with a width of fifty feet on either side. The answer averred that the defendant, as the grantee and successor of said company, occupied and built its road to completion over said road-bed so made by its predecessor, and conformably to said grant from plaintiffs, and it is then averred that if any damage was sustained by plaintiffs by reason of any of the matters complained of, the same was caused by the said Lexington, Lake & Gulf Railroad Company when defendant entered thereon, and plaintiffs having required the said railroad so built by defendant to be built on said road-bed, cannot now complain, but are estopped, etc. The answer further pleaded that the plaintiffs, by their deed having granted, for a valuable consideration, the right of way to build and maintain over its said way a railroad, had conceded to defendant the right to build embankments, if necessary to its use; that said road as far as built by it was done with due care, free from negligence, with proper culverts and appliances for drainage; and if any damage had resulted to plaintiffs it was such only as resulted unavoidably from the proper use and employment of defendant's franchise and property.

The cause was tried before a jury. The evidence showed that the road-bed in question was constructed by the said Lexington, Lake & Gulf Railroad Company; that in 1878 the defendant company was operating the road and built a culvert through the road where it runs across plaintiff's land. This culvert emptied into a natural water course of considerable size with a deep bed and wide banks. From plaintiffs' land on the south side of the road (the water-fall being from the southeast to the northwest) there were no natural water courses, or branches so-called. The land was rolling prairie, and the water ran off by surface flow. To the east of plaintiffs' land, say a quarter of a mile, was a farm, the topography of which was similar to that of plaintiff-

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iffs', the water running therefrom in the same general direction. Where it struck the railroad there was an embankment of about five feet. The water was carried from this point by means of an artificial ditch dug by defendant on its right of way to and discharged through said culvert into said natural water course. The injury, if any, done to plaintiffs' land was by reason of the increased flow of the volume of water through this culvert, and its spread over the contiguous land. The evidence, so far as applicable to the questions of law to be decided, will be noticed in its proper connection.

The court gave, on behalf of plaintiff, the following instructions :

1. If the jury believe from the evidence that there were one or more water courses which began and ran east of plaintiffs' land, and did not run over or through said land, and which by their natural channels crossed the line of defendant's road-bed east of plaintiffs' said land, and that in the construction of said road-bed defendant failed and neglected to provide and construct proper culverts and water-ways for the passage of the water running in said water courses through said road-bed, but did so build and construct said road-bed that the said water courses, if any, were dammed up, and the water which was accustomed to run in them was diverted from its natural channels, and by means of an artificial ditch or otherwise, defendant turned the same over and across the land of plaintiffs, and that plaintiffs were damaged thereby, then they will find for plaintiffs on the first count in their petition.

2. It is not necessary, in order to constitute a water course for the purposes of this suit, that there should be water constantly in the bed or channel thereof, but it is sufficient if the same have a permanent natural location and that water is accustomed to run therein during a part of the year and in certain seasons, and is made up from the running of surface water which finds its natural outlet through its channel.

3. If the jury find for the plaintiffs, the measure of damages will be the difference in the market value of plaintiffs' land immediately before the diversion of the water courses, and immediately afterward, not exceeding the amount claimed in the petition, not taking into account any other damage which may have been occasioned by the construction of said railroad, save that occasioned by the diversion of water courses.

4. If the jury believe from the evidence that there is a water course which began and ran west of plaintiffs' real estate described in their petition, and did not run over or through said land, and which by its natural channel crossed the line of defendant's road-bed west of plaintiffs' said land, and that in the construction of its road-bed defendant failed and neglected to provide and construct proper culverts and water-ways for the passage of the water running in said water course through said road-bed, but did so build and construct said road-bed that the said water course, if any, was dammed up and the water which was accustomed to run in said water course was diverted from its natural channel and turned and made to flow over and across the land of plaintiffs, and that the plaintiffs were damaged thereby, then they will find for plaintiffs on the second count in the petition.

The defendant asked the following instructions :

1 On the evidence in this case the plaintiffs cannot recover.

2. If the jury believe from the evidence that the road-bed and embankment of the defendant were constructed in the usual and proper manner with a culvert of sufficient capacity for the escape of water, and that said embankment was necessary for the building of defendant's railroad, and that no natural water course was interfered with by defendant or its agents, or the Lexington, Lake & Gulf Railroad Company, but that plaintiffs' damage, if any was sustained, was caused by surface water alone, then plaintiffs cannot recover, and the jury will find for defendant.



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3. The difference between surface water and a natural water course is, that surface water is such water as is caused by the melting of snow and ice, and rains, which water diffuses itself over the ground, while a water course is a running stream of water having a bed and clearly defined banks, though a water course may be sometimes dry; and if the jury believe from the evidence that the water that flowed through the culvert on plaintiffs' land was surface water as above defined, then plaintiffs cannot recover, and the jury will find for defendant.

4. If the jury believe from the evidence that plaintiffs by deed conveyed the right of way through the land in controversy to the Kansas City, St. Louis & Chicago Railroad Company, its successors and assigns, and that said company afterward conveyed all its interest to the defendant company, and that the latter completed its road by the 31st day of December, 1879, then in the absence of any negligence, unskillfulness or mismanagement in the construction of the embankment or the road-bed, the injury done to plaintiffs' property, if any injury was done, must be considered as the natural and necessary consequence of what the defendant had acquired the lawful right to do, and such damages, if any were sustained, must be taken to have been included in the compensation paid for the right of way, and for such damages plaintiffs cannot recover.

5. It is the privilege and duty of the defendant to dig or cause to be dug along the side of its road-bed and embankment a ditch of sufficient capacity to carry off the surface water caused by melting snows, ice and rain; and if the jury find from the evidence that the injury of which plaintiffs complain was caused by surface water as defined in instruction number three, passing along and through the ditch on the south side of defendant's road, and thence through the culvert over the plaintiffs' land, then the plaintiffs cannot recover, and the finding should be for defendant.

6. If the jury believe from the evidence that the in-

juries and damages claimed by the plaintiffs were occasioned by the flowing or flooding from surface water, and not by the diversion by the defendant of a natural water course, as defined and explained in instruction number three, then there can be no recovery in this case, and the finding must be for the defendant.

All of which the court refused, save the fourth. The jury returned a verdict for the plaintiffs in the sum of \$175, from which defendant has appealed.

I. If there were no other questions involved in this record than the amount of the verdict itself, it is not apparent how the judgment of the circuit court can be sustained. The jury unquestionably took as their guide in estimating the amount of damages the mere opinion of two witnesses, who were permitted to express it as to what they would consider the difference between the value of the land with the railroad obstruction and without it, rather than the actual damage proven to have been sustained. Under the issues no prospective damages could be considered by the jury, nor the relative value of the plaintiffs' land with or without the railroad embankment, or the manner of draining the lands. It was simply as to the amount of damage plaintiffs had sustained by reason of the wrongful inundation, if any, of the land. Plaintiffs' testimony touching this issue was this: Leeper stated, "I never saw the water overflow the Benson land; I saw where it had overflowed about one-fourth of an acre. The land was worth \$40 an acre." Price stated, "I have seen no water flow over Benson's land up to March 19th, 1879," (the date of the institution of the suit). Prather stated, "I cannot say that Benson is damaged; under some circumstances I think she would be benefited; in a dry season it is very desirable for farmers to have plenty of water for stock; there is nothing like a well defined channel obstructed by this railroad; it is all smooth plow land; they plow and run reapers over it." Wilson stated, "There is corn growing on part of the Benson land, and wheat and

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meadow on the balance." From which it is apparent that there was no evidence of any overflow, save the single instance mentioned by the witness Leeper, and that was limited to one-quarter of an acre. As the evidence did not disclose that any crop was at the time growing on the overflowed ground, the only damage possible was to the soil itself, valued at \$40 per acre; one-fourth of which was \$10, and yet on this evidence a verdict was rendered for \$175. While appellate courts should be slow to interfere with the prerogative of juries, in passing on the weight and probative force of testimony, and should not interfere where there is any evidence tending to establish a given issue, yet where there is, as in this case, absolutely no evidence to support the verdict beyond the sum of \$10, it becomes the imperative duty of this court to reverse such a judgment.

II. Under the petition and the facts in this case, we are also of opinion that the rule for the assessment of damages declared in the third instruction given on behalf of plaintiffs, was incorrect. The action is for damages consequent upon the flooding of plaintiffs' land. This is not an action of trespass *vi et armis*, but it is an action on the case for flooding plaintiffs' land. In such case the plaintiff can only recover for damages done up to the institution of suit. *Langford v. Owsley*, 2 Bibb 216; *Shaw v. Etheridge*, 3 Jones (N. C.) 301; *Moore v. Love*, 3 Jones (N. C.) 218; *Blunt v. McCormick*, 3 Denio 283. The same rule seems to have been recognized in the instructions given in *Wayland v. St. Louis, K. C. & N. R'y Co.*, 75 Mo. 552. How could the jury under the facts of this case take into consideration any further injury to this land? The evidence showed that never since the building of the culvert in question had there been rainfall sufficient to determine the capacity of the culvert and the ravine beyond to carry off any water that might ordinarily fall. Much would depend in such case on the contingency of an unusual rainfall, the amount of water that might be absorbed by the earth, depending on its dearth, etc. Dam-

2 MEASURE OF DAMAGES IN ACTION FOR FLOODING LAND.

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ages based on such data would be wholly speculative and unreasonable. The case is unlike that of an ascertained and permanent nuisance where prospective damages are allowable.

III. As the case must be re-tried it is proper to discuss, so far as is practical, other questions of law arising on this record.

The authorities are agreed generally against the right of one land proprietor to divert from a natural water course water so as to throw it upon an adjacent proprietor to his injury. But as to the right of a dominant proprietor, to divert mere surface water and turn its flow upon his neighbor, there is much conflict and confusion. Each case must, in large measure, depend on its own peculiar facts. The general rule, it is true, applicable to the enjoyment of real estate is expressed in the maxim: *cujus est solum, ejus est usque ad coelum*. He has ordinarily, the right to use and improve his real estate by protecting it against water flowing over its surface. In doing so the dominant proprietor may turn it from his land on to the servient or lower land, without liability to damages. Ang. Wat. Courses, 120. Mere surface water, that which does not run in any defined course or confined channel, is regarded as a common enemy, against which any land owner affected by it may fight. *Hoyt v. City of Hudson*, 27 Wis. 656; *Hosher v. Kansas City, St. Jo. & C. B. R. R. Co.*, 60 Mo. 333. But in doing so regard must be had to another recognized maxim of law: *sic utere tuo ut alienum non laedas*. Whatever may be the rule prevailing in some states, it seems to be established in this State, that in respect even to surface water the dominant proprietor has no right in diverting it to obstruct its egress by collecting it together, as in artificial ditches, and conduct it to and discharge it upon the servient land, in increased volume, thereby subjecting the latter estate to a burden and injury it otherwise would not have suffered. *McCormick v. Kan.*

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*sas City, St. Jo. & C. B. R. R. Co.*, 70 Mo. 359; *Shane v. same*, 71 Mo. 237.

The deed from plaintiffs conceded to this company the right to make embankments, if necessary, and to construct culverts and ditches deemed necessary for the proper grade and protection of the road. And if in the legitimate exercise of such right the flow of surface water from plaintiffs' land was obstructed to their injury, it would clearly be a case of *damnum absque injuria*. *Clark's Adm'r v. Hannibal & St. Jo. R. R. Co.*, 36 Mo. 224. So it follows that plaintiffs could not recover any damage resulting from the accumulation of mere surface water running from their land. Especially so under the facts of this case, as the water from their land which is surface water, runs off through the culvert constructed in its natural path. If there has been any damage, for which a recovery can be had under this petition, the injury must have resulted from the interference by defendant with the water flowing from the lands east of plaintiffs.

Regard must be had to the issue tendered by the petition. It is obvious from its reading, that the matter to be tried was the damages resulting from the manner of constructing the road-bed. The *gravamen* of the complaint is, that in building it "defendant failed and neglected to provide and construct proper openings and water-ways." There is really no such issue tendered as would present for determination, any question touching the obstruction of the flow of mere surface water, and its precipitation upon plaintiffs' land through artificial ditches improvidently constructed by defendant whereby an unusual accumulation of water was collected and turned on to plaintiffs' land.

The first instruction given on behalf of plaintiffs was not justified by the petition or the proofs.

In the first place, it is improperly predicated on the existence of "one or more water courses which by their natural channels crossed the line of defend-

4. WATER COURSE.

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ant's road-bed." There was, in legal contemplation, no evidence of any water course. The best legal definition of the term "water course," which I have found, is that given by Dixon, C. J., in *Hoyt v. City of Hudson*, 27 Wis. 661: "There must be a stream usually flowing in a particular direction, though it need not flow continually. It must flow in a definite channel, having a bed, sides or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing in the hollows or ravines in land, which is the mere surface water from rain or melting snow, and is discharged through them from a higher to a lower level, but which at other times are destitute of water. Such hollows or ravines are not in legal contemplation water courses." Saying nothing of defendant's evidence, plaintiffs' own evidence showed that the so-called waterfalls were nothing but depressions in the land, dry except when it rained. There were gullies, but dry except in freshets. The whole land was cultivated. One of these witnesses said: "There is nothing like a well defined channel obstructed by the railroad; it is all smooth plow land; they plow and run reapers over it"—from which it is palpable that it was mere surface drainage.

In the second place, this instruction in effect told the jury that if this channel water was diverted from its usual course "by means of an artificial ditch or otherwise" on to plaintiffs' land, to their damage, they could find for the plaintiffs. This was clearly a departure. It ignored the issue tendered in the petition of a negligent construction of the embankment and the culvert, to which defendant's evidence was properly directed.

So the second instruction asked by defendant should have been given. The first part of it was directed to the issue made by the petition, and the latter part of it denied the right of recovery, if the "damage was caused by surface



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water alone." *Hosher v. Kansas City, St. Jo. & C. B. R. R. Co.*, 60 Mo. 333; *Munkres v. same*, 72 Mo. 514.

Likewise under the issues in this case, we think the defendant was entitled to an instruction defining what constitutes surface water in contradistinction to a water course. And if there was no neglect and unskillfulness in the construction of the embankment and the culvert, and the water-flow was mere surface, under the petition the defendant would be entitled to a verdict.

The judgment of the circuit court is reversed and the cause remanded for re-trial in accordance with this opinion. All concur.

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WARD V. ASHBROOK, *Appellant*.

**Breach of Covenant against Incumbrances: DAMAGES.** An inchoate right of dower existing at the date of a deed containing a covenant against incumbrances, and the demand of dower after it becomes consummate, will constitute a breach of such covenant: and the covenantee may by purchase thereafter extinguish the dower and recover a reasonable price paid therefor as damages for such breach.

*Appeal from the Common Pleas Court of Tipton, Moniteau County.*—HON. F. L. EDWARDS, Judge.

AFFIRMED.

*J. F. Taylor* and *John Cosgrove* for appellant.

*J. E. Hazell* and *Draffen & Williams* for respondent.

MARTIN, C.—This was a suit for breach of covenant against incumbrances. By his deed of September 28th, 1869, the defendant conveyed the land in controversy to Mary J. Hardy and therein covenanted with her and her

heirs and assigns, that he was seized of an indefeasible estate in fee simple in the premises conveyed, and that said premises were free and clear from any incumbrances done or suffered by him or those under whom he claimed, and that he had good right to convey the same. On the 23rd day of March, 1875, said Mary J. Hardy conveyed the same to plaintiff with the statutory covenants of title. The plaintiff, as the assignee of the defendant's covenants, brought suit upon them, alleging that an incumbrance existed in the form of a dower right in favor of the widow of the owner under whom defendant derived title, that dower had been demanded by her, and that he had been compelled to pay \$100 in order to extinguish her interest and estate, and that this sum represented its reasonable value. The answer consisted of a general denial, with an averment that the widow referred to by plaintiff had previously released to defendant her inchoate right of dower by deed of September 24th, 1869. This was denied by plaintiff in his replication.

The case was tried by the court without a jury. The following is an agreed statement of facts:

"It is agreed that on the 2nd day of April, 1864, defendant purchased land, at sheriff's sale, under a distress warrant against A. B. Fisher, who had, at the time, the legal title; that the defendant sold the land to Mary J. Hardy and conveyed the same to her by deed containing the covenants mentioned in the petition; and that Mary J. Hardy sold and conveyed the same to plaintiff by deed containing the covenants mentioned in the petition. It is further admitted that at the time defendant purchased at sheriff's sale, Mrs. Martha Fisher was the wife of A. B. Fisher, and had dower in the land, and that afterward, during the lifetime of her husband, to-wit, on the 24th day of September, 1869, Mrs. Fisher made a quit-claim deed to the defendant, but in this deed her husband did not join; that afterward, A. B. Fisher died, and his widow intermarried with one Stewart, and they made demand for her

dower, and plaintiff paid \$100 for a relinquishment of the same, and if she had a dower interest at that time, it was reasonably worth \$100."

There was some other evidence admitted corroborative of this statement, and some excluded which was contradictory of it. The previous release of dower right by the widow which was pleaded by defendant consisted of a deed made by her in the lifetime of her husband to which he was not a party. This deed was properly excluded. It was next maintained by defendant that the plaintiff had parted with her right to sue on the covenant by conveyances of the land to one Cohn before extinguishment of the dower right resting upon the land. But this position was not supported by the evidence. No deed from the plaintiff to Cohn was offered or given in evidence. And the parol testimony is to the effect that Cohn refused to accept a deed until the dower right was paid off and extinguished by plaintiff. Judgment was rendered for plaintiff in the amount claimed, and the defendant comes here on appeal.

Under the decisions of this court the existence of a paramount right or title and the hostile assertion of it by suit or otherwise constitute a breach of the covenant sued upon. The covenantee is not bound to wait for actual dispossession under process, but may after such assertion, pay off or extinguish the right by purchase, and his measure of damages will be the reasonable value of the right so discharged or extinguished by him. *Williamson v. Hall*, 62 Mo. 405; *Maguire v. Riffin*, 44 Mo. 512; *Dickson v. Desire*, 23 Mo. 151, 157; *Kellogg v. Malin*, 62 Mo. 429; *Morgan v. Hannibal & St. Jo. R. R. Co.*, 63 Mo. 129; *Walker v. Deaver*, 5 Mo. App. 147, 139.

The agreed statement of facts gave a *prima facie* cause of action on the covenant mentioned in the petition, and there is no evidence in the record to rebut or overthrow it. According to this statement there was outstanding a dower right, which sprung from the estate of a former owner under whom defendant derived his title. This right was

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demand, which constitutes a sufficient hostile assertion of it to justify its purchase and extinguishment. The amount paid is admitted to have been a reasonable one. The fact that the deed of extinguishment was taken by the plaintiff to Cohn with whom she had a contract to sell the land instead of to herself, does not give the right of action to Cohn in face of the facts that the consideration of the deed was furnished by plaintiff, and that no conveyance to Cohn had been effected or completed prior to the deed of extinguishment. The deed of relinquishment under these circumstances would enure to the plaintiff. Upon the evidence in the case there could not have been a judgment for defendant, and it is unnecessary to review the instructions. The judgment is for the right party and is affirmed. All concur.

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GODDARD, *Appellant*, v. JONES.

**Deed of Trust on Personalty: VOID AS AGAINST CREDITORS.** A deed of trust to secure a debt described the property as "all and singular the farming implements and tools and live dairy cattle now on the grantor's farm, together with all their increase or substitutes therefor during the lien of this deed, to the value at any time of \$4,000," and again as "a constant and continuous stock of farming implements, tools and live dairy cattle and their increase, of a valuation of at least \$4,000." It also stipulated that the grantor should at all times keep on his farm property of the kind described, "worth on peremptory sale under the provisions hereof at least \$4,000," or, as stated in another place, "at any time in value equal to an appraisalment of \$4,000." No method was provided for having an appraisalment made, and it did not appear but what the implements, tools and cattle on the farm exceeded \$4,000 in value. *Held*, that as against other creditors of the grantor the deed was void, (1) Because by the use of the word "substitutes" it impliedly gave the grantor authority to sell and dispose of the cattle in the ordinary course of business; (2) Because of indefiniteness in the description of the property.

*Appeal from Jefferson Circuit Court.*—HON. L. F. DINNING,  
Judge.

AFFIRMED.

*Wm. B. Thompson* for appellant.

*O. G. Hess* and *W. H. H. Thomas* for respondent.

NORTON, J.—This suit is before us on appeal from a judgment of the circuit court of Jefferson county, and the controlling question in the case is, whether or not a deed of trust executed by Casper H. Kerckhoff to plaintiff as trustee, transferring to him certain personal property to secure certain debts therein mentioned, is void as to the creditors of said Kerckhoff.

The deed of trust, after conveying seven different tracts of land in Jefferson county, conveys the following described property: Also all and singular the farming implements and tools, and all and singular the live dairy cattle now on said land and farm, together with all their increase or substitutes therefor during the lien of this deed of trust to the value, said implements, tools and cattle at any time, of \$4,000; that is to say there is hereby conveyed and this deed, during the lien thereof, is to comprehend and be a lien on a constant and continuous stock on said lands and farm of farming implements, tools and live dairy cattle and their increase, of a valuation of at least \$4,000.

The deed described seven promissory notes executed by grantor, payable at different dates and amounting to \$14,000. It also provided: (1) That during the lien so created said Kerckhoff will keep up on said farm, constantly and continuously, a stock of live dairy cattle and increase thereof and substitutes therefor, and farming implements and tools, which on demand of payment of notes hereunder will and shall be worth on peremptory sale under provisions hereof at least \$4,000. (2) That during the lien

of this deed of trust he, said Kerckhoff, will and shall at his own expense and cost keep and preserve all the fences, and guards, and buildings on and about said lands and farm in good and husband-like condition and repair. (3) That during the lien of this deed of trust he, said Kerckhoff, will and shall use said lands and farm mainly and particularly as a dairy farm and for dairy purposes. (4) That during said lien he, said Kerckhoff, will and shall use the crops raised on said lands in feeding and increase of such cattle and substitutes therefor so that at all times the stock of farming implements and tools and live dairy cattle on said lands and farm shall at any time in value be equal to an appraisement of \$4,000. (5) That during the lien of the deed of trust there shall be on the land and farm herein conveyed and subject to the lien of this deed and power of sale herein given, a stock of farming implements, tools, etc., and particularly live dairy cattle, at all times worth at least \$4,000.

The circuit court held this deed of trust, as to the personal property, void as to the creditors of the grantor. We are of opinion that this ruling was correct. It is well settled that when it appears from the face of the mortgage or deed of trust that the goods mortgaged were to remain in the possession of the grantor and be disposed of by him in the usual course of trade, the deed is void as to creditors. *White v. Graves*, 68 Mo. 218. While the deed under consideration does not in express terms authorize the grantor to sell and dispose of the property, the power to do so is implied from the authority expressly given to substitute other property of the kind conveyed. Besides, the property conveyed is so indefinitely described, as to put it out of the power of a creditor to ascertain what was conveyed, especially so if the farming implements, tools and live dairy cattle on the farm conveyed exceed \$4,000; for it will be observed that the deed does not convey all of the farming implements, tools and dairy cattle on said farm, but only so much thereof as equals in value \$4,000, and this value was to be



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ascertained according to one provision in the deed by peremptory sale, and according to another, by appraisement, without any method being devised to have such appraisement made. Under such a conveyance, although the property on the farm might be largely in excess of \$4,000 in value, the creditor of the grantor could be dealt with by him and the beneficiary in the deed of trust at arms-length. Upon an examination of the record, we fail to perceive that on the trial plaintiff either showed, or undertook to show, that all the farming implements, tools and live dairy cattle were only of the value of \$4,000. Without elaborating the question further and showing to what consequences the upholding of such a conveyance would lead, we are of opinion that the judgment is for the right party, and for the reasons given affirm it. All concur.

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RYAN *et al.*, *Plaintiffs in Error*, v. RIDDLE.

**Joint Contract:** PARTIES TO SUIT. All the joint obligees of a bond are necessary parties plaintiff in an action for its breach; one of them cannot be made a co-defendant, upon an allegation in the petition that he refused to join with plaintiffs in the prosecution of the action. Section 3466, Revised Statutes 1879, does not apply to such a case. *McAllen v. Woodcock*, 60 Mo. 174, distinguished.

*Error to Bates Circuit Court.*—HON. F. P. WRIGHT, Judge.

AFFIRMED.

*T. J. Galloway* for plaintiffs in error.

*P. H. Holcomb* for defendants in error.

MARTIN, C.—The plaintiffs sue as joint obligees in a bond. The bond was executed by James Riddle, defendant, as sole obligor, in favor of the plaintiffs and the de-

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fendant Smith, as joint obligees. It seems that defendant, James Riddle, sold to Josiah J. Ryan, Luther Shobe and Frank Smith, a stock of tools used by him in the tin business, and that in consideration of the sale he gave them his written obligation conditioned that he would not manufacture tinware or sell stoves in the town of Butler for the space of one year. The plaintiffs, being two of the obligees, bring this suit, alleging a breach of the bond by Riddle, the obligor; they further allege in substance that Frank Smith, their co-obligee, at the execution of the bond and since that time, has been secretly engaged with Riddle and with others in manufacturing tinware; and that he refused to join with plaintiffs in the prosecution of their suit, for which refusal he was made defendant under the provisions of the practice act. The defendant Riddle demurred to the petition, and judgment was rendered in favor of defendants, from which a writ of error is prosecuted in this court.

The instrument sued on is clearly a joint obligation for the payment of money. At common law no action could be maintained on it except in the names of all the obligees or their representatives. It is argued by the plaintiffs in error that this rule of the common law has been modified by section 3466 of the practice act, which reads as follows: "Parties who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should be joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the petition." R. S. 1879, § 3466. This provision has remained in the same language since the adoption of our code of practice. It embodies a rule familiar to equity plead-ers, but was unknown at common law. The construction given to it in modern practice has not been uniform. In some states it has been applied to law cases. *Hill v. Marsh*, 46 Ind. 218; while in others it has been confined to equity cases. *Andrews v. Mokelumne Hill Co.*, 7 Cal. 330. If it was still open for construction in this State, we might hesitate between conflicting constructions. *Habicht v. Pember-*

ton, 4 Sandf. 657. But at an early day our Supreme Court held that this clause in our practice act did not authorize any number less than the whole of the obligees in a bond for the payment of money to maintain suit upon it. *Clark v. Cable* 21 Mo. 223; *Rainey v. Smizer*, 28 Mo. 310.

In an action of ejectment brought in the name of the trustees of a corporation, one of the trustees appeared in court and as plaintiff asked leave to dismiss the case so far as it concerned him, which was refused by the court upon the other plaintiffs giving bond to indemnify him against costs. The learned judge giving the opinion in the appellate court held that there was no error in this action of the court for the reason that upon his refusal to join as plaintiff he might have been placed on the other side as defendant. *McAllen v. Woodcock*, 60 Mo. 174. The previous cases were not overruled or alluded to in the opinion. The rights and obligations of the plaintiffs as officers and trustees of a corporation present a marked distinction between them and the obligees of a note or bond, which would naturally forbid the result of overruling the previous cases on such instruments, in the absence of any allusion to them. These early cases have been accepted and followed by the profession for nearly thirty years, and there is nothing peculiar to the case at bar, which can justify a distinction in its favor.

Certain incidents flow from the nature of a joint obligation or rather an obligation enuring to joint obligees. They are joint proprietors, and one must have as much right as the other to say and determine when suit shall be brought and when it shall be compromised or settled without suit. Neither can sue alone for his proportion. 1 Parsons Con., p. 13. It has been settled in this State that one of two joint obligees of a contract has the power to discharge and release the joint obligation. This was recently held in the case of *Henry v. Mount Pleasant Township of Bates Co.*, 70 Mo. 497, in which it was charged in the petition that the plaintiff's co-obligee had fraudulently and col-

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lusively combined with the obligor being sued to defraud the plaintiff out of his portion of the joint demand by receiving the amount of it and giving a bond to indemnify the obligor against the plaintiff. The judgment of the lower court sustaining a demurrer to the petition, was affirmed, and the case of *Clark v. Cable* was cited in support of the opinion. If one of the obligees can settle and dispose of the whole demand, it would be difficult to deny him upon principle as well as authority the lesser right of preventing suit upon it without his consent. The right of release and discharge remaining with him would render the right to sue without him an unavailing advantage, because he could release the whole demand after suit as well as before.

It seems to me the obligor of the contract is also interested in the mode of enforcing the obligation he has assumed. A suit against him by an obligee, although including the other obligee as defendant, necessarily involves an issue in which he is not interested, viz., a settlement of the interest or share belonging to each obligee respectively. This might involve the taking of a long account and the settlement even of a partnership.

For these reasons I am persuaded that the disability of the plaintiffs to maintain their suit in this form is an infirmity which inheres in the nature of the contract they entered into, and is not mere matter of form intended to be abolished by the practice act. The judgment is affirmed. PHILIPS, C., concurs.

WINSLOW, C., DISSENTING.—I cannot concur in the foregoing report. In my opinion Revised Statutes, section 3466, was intended to apply to all classes of actions. The code applies to all classes of actions, and, in adopting the rules of practice under it, its framers simply adopted many of the old equity rules of practice, because of their greater liberality and for the express purpose of abating the strictness of the old common law rules. It may as well be said

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Bassett v. Elliott's Administrator.

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that the entire code only applies to equitable actions, as that the section in question is so limited. There is no exception to indicate any such intention. Every action is now an action on the facts, all the old forms and distinctions having been abolished. The last expression of this court is to the effect that the section in question applies to an action of ejectment, which is not an equitable action. *McAllen v. Woodcock*, 60 Mo. 174. *Henry v. Mt. Pleasant Tp.*, 70 Mo. 497, 500, does not conflict with *McAllen v. Woodcock*. There only one of two joint obligees had sued, and it was held that he could not sue alone. The other obligee was not before the court on either side. The question involved here was not directly considered. I think that *Clark v. Cable* and *Rainey v. Smizer*, cited in the majority report, should be overruled, and a more liberal and rational rule established. They are adverse to the true spirit of the code.

The majority report was approved, RAY, J., dissenting; SHERWOOD, J., absent.

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BASSETT V. ELLIOTT'S ADMINISTRATOR, *Appellant*.

**Administration: JUDGMENT DEMANDS.** Those provisions of the Administration Act which ordain the payment of judgments against the estates of deceased persons in the order of priority of their liens, can be invoked only when an estate is insolvent. By this is meant such a condition as renders it necessary to obtain satisfaction by means of the lien on the real estate. Proof that the personalty is insufficient to pay the judgment is sufficient evidence of insolvency.

*Appeal from Linn Circuit Court.*—Trial before CARLOS BOARDMAN, Esq., sitting as Special Judge.

**AFFIRMED.**

*A. W. Mullins* for appellant.

*Strong & Mosman* and *Chas. L. Dobson* for respondents.

MARTIN, C.—This suit was commenced by an application to the probate court of Linn county for an order to compel an administrator to pay certain proceeds of a sale of real estate to the plaintiffs as owners of a judgment lien. On the 10th day of May, 1877, the plaintiffs recovered a judgment against William H. Elliott in the sum of \$1,910.28. On the 14th day of December, 1877, said Elliott died leaving the judgment against him for the most part unsatisfied. The judgment was duly presented and assigned to the fourth class of claims as a demand against his estate. Elliott was seized of a large amount of real estate at the time of his decease. It appeared in the course of the administration that the personal property was not sufficient to pay the debts of the deceased, and thereupon the defendant, who was administrator of the estate, filed his petition on the 15th day of February, 1878, in the probate court, alleging that fact, and stating further that the real estate of the deceased was bound by the lien of the judgment in favor of plaintiffs as also by the lien of another judgment in favor of one F. S. Black in the sum of \$220, and praying for an order to sell the real estate therein described, or so much as would be necessary to pay the debts against the estate. In pursuance of this petition an order of sale was made, and the administrator effected a sale of several thousand dollars' worth of real estate. On his refusal to pay any of the proceeds to plaintiffs, they made their application for an order to compel him to do so. After a trial of the facts alleged in the application, the probate court made an order on him to pay over the sum of \$750, that being the amount found by the court to be in the hands of the administrator payable on the judgment lien of plaintiffs. From this judgment an appeal was taken to the circuit court, where the case was tried *de novo*, and ter-



minated in an order of payment in the same amount which had been entered in the probate court. From this last judgment the case comes here on appeal.

I am unable to discover any merit in this appeal. It is not pretended by the defendant that the lien of a judgment on real estate is terminated by the death of the debtor. It is true that the judgment creditor is no longer able to enforce his lien by execution, but he is not without remedy in the probate court. It is provided in our Administration Act that when the administrator is compelled to resort to the real estate to obtain funds to pay debts, he shall in his application for the order, mention the liens to which it is subject. It is also provided that the proceeds of the sales of such real estate shall be first applied to the payment of the judgment liens according to their priority, and that only the surplus after payment of such liens becomes assets for payment of general creditors. 1 Wag. Stat., p. 95, §§ 11, 12, 13, 14, 15, 16; R. S. 1879, §§ 146, 152, 153, 154; *Kerr's Adm'r v. Wimer's Adm'r*, 40 Mo. 544. Such liens are to be paid according to their priority and irrespective of classification. Our statute on the classification of demands evidently contemplates that the liens of judgments are not to be discharged in this manner, unless there is a necessity for it in the insolvency of the estate. R. S. 1879, § 184. By this is meant such insolvency as shall render it necessary to make the money by virtue of the lien on the real estate. It is objected by defendant that there was no proof of insolvency. But in this he is mistaken. According to his sworn statement there was only the small sum of \$300 in personalty. This I think was sufficient proof of insolvency to justify a resort to the real estate for payment of the judgment. *Turner v. Adams*, 46 Mo. 99; *Wiley v. Bradley*, 67 Ind. 560.

It is unnecessary to review the instructions. No other judgment than the one rendered, could be justified by the law and the evidence. Accordingly it is affirmed. All concur.

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Silver v. The Kansas City, St. Louis & Chicago Railroad Company.

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SILVER, *Appellant*, v. THE KANSAS CITY, ST. LOUIS & CHICAGO  
RAILROAD COMPANY.

**Railroads: FENCES: KILLING STOCK: TRESPASS OF STOCK.** Under section 809, Revised Statutes 1879, the obligation of a railroad company to fence its road, is not postponed until the completion of the road and the running of cars thereon for the carriage of freight and passengers for hire. Although one of the objects of the statute be the security of passengers and employes in transit, its primary object is to prevent the killing of stock and their trespasses upon adjoining fields: and when the necessity for such protection to the owners of land and stock begins, then the obligation to fence attaches; and the company will be liable for the damages caused by its failure to fence, after a reasonable time for the erection of fences has elapsed.

2. ———: ———: ———: ———. The liability of a railroad company for failure to erect fences on the sides of its road under the statute, cannot be defeated by its contract with another person to erect such fences.

*Appeal from Audrain Circuit Court.*—HON. G. PORTER,  
Judge.

REVERSED.

*Ira Hall* for appellant.

*Macfarlane & Trimble* for respondent.

MARTIN, C.—This was an action against a railroad company for the killing of stock, and for damages to growing crops. The petition was filed on the 4th day of January, 1879, and contains four statements or counts. In the first the plaintiff sues for the killing of seventeen sheep, valued at \$59.50, on the defendant's track, to which they had strayed by reason of defendant's failure to erect fences as required by law, which now appears in section 809 of the statutes of 1879. This is an action under the statute, and double damages are asked. In the second count the plaintiff sues at common law for negligence in killing the same stock, claiming single damages only. In the third count

he sets out an action under the same section of the statute, for damages in the sum of \$50, inflicted on his growing crops by stock, which had entered his fields by reason of the defendant's failure to build fences as required in said section. In this count he asks for double damages. In the fourth count he sues at common law for the same destruction of crops, alleging that defendant, by its servants and agents, had unlawfully thrown down the fences inclosing his fields, whereby cattle and other animals had entered upon and destroyed the crops growing therein.

It will be seen from this statement, that the petition contains two statutory actions for omission of the defendant to build fences, one for sheep killed on the track, the other for destruction of growing crops by cattle, and two common law actions for the same injuries, one sounding in negligence, and the other in trespass. As the legal sufficiency of these counts has not been urged before us, I will not consider them with reference to that point.

The answer contains a denial of the allegations of the petition. It also contains a special plea or defense, to the effect, that defendant had the right and power to construct a railroad through the plaintiff's lands; that it had bought and paid plaintiff for the right of way through them; that it had entered into a contract with the Chicago & Alton Railroad Company, a corporation under the laws of Illinois, by the terms of which the latter corporation was to construct the defendant's road from Mexico to Kansas City; that said last mentioned company had sub-let to Messrs. J. S. Wolff & Son the construction of a certain part of the road, including the part running through plaintiff's lands; that said J. S. Wolff & Son went upon said lands and constructed the same, doing no more injury than was necessary to conveniently build said road; that if said J. S. Wolff & Son unlawfully threw down, or left down the fences inclosing plaintiff's lands, such acts were without the authority of the defendant, and were wholly outside their authority

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as contractors, and for which defendant ought not to be held responsible.

The case was tried by a jury. The evidence submitted by plaintiff tended to prove that defendant's railroad ran through plaintiff's inclosed and cultivated fields, that in May, 1878, the road was constructed through said fields; that during the construction, the fences running across the right of way were torn down; that no fences were built along either side of the road to protect the plaintiff's fields from the incursions of stock; that by reason of the want of such fences, cattle, horses and other stock passed into plaintiff's fields and damaged his crops to the extent of \$45; that defendant's road was completed through plaintiff's fields about the 1st day of June, 1878, and freight cars were run over the road; that no fences were built alongside of the road until sometime in the fall of 1878; that no other protection of the plaintiff's fields was provided by defendant, and that two-thirds of the damage complained of was after the completion of the road through plaintiff's land. The plaintiff also gave evidence tending to prove that in the month of August, 1878, seventeen sheep of the value of \$47, belonging to him, strayed from inclosed fields, through which the road passed, by reason of a want of a fence along defendant's road, and were killed by the engines and cars on defendant's road; that trains of open and box cars had been running back and forth on the road since the completion of it over plaintiff's land in June, 1878.

Defendant's evidence tended to show that defendant had acquired the right of way over plaintiff's land; that the construction of the road over it was made by J. S. Wolff & Son, as contractors, who hired and controlled the workmen, and that the engines and cars run upon the road prior to plaintiff's alleged damage, were only used in carrying supplies to be used in the construction of the road. Defendant also produced documentary evidence of the contract with the Chicago & Alton Railroad to construct the road, also of the sub-contract of J. S. Wolff & Son to build

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that portion of it which extended over plaintiff's lands. The contract with the Chicago & Alton Railroad included a perpetual lease of the whole road to it, at a rental equivalent to a designated portion of the profits and earnings of the road.

At the close of the evidence the court refused the instructions asked by plaintiff. They need not be considered for the reason that the law governing the case is sufficiently involved in the instructions given at the instance of defendant. In these instructions, the jury were told that their verdict must be for the defendant on the statutory actions in the first and third counts of the petition, unless the killing of the sheep in the first count and the destruction of the crops in the third count, happened after the completion of the road, and after the company had commenced running trains of cars thereon, for the carriage of freight and passengers for hire. In respect to the common law action for the killing the sheep contained in the second count, the jury were told that they could not find for the plaintiff unless the train of cars was managed or controlled by defendant or its employes, and the defendant was wanting in the exercise of reasonable care in running the train, and in reasonable effort to avoid striking the sheep, and the killing was the result of such want of care or negligence. In respect to the fourth count which related to trespass in throwing down fences, the jury was instructed to find for defendant, if the defendant had placed the construction of its road in charge of the Chicago & Alton Railroad as contractors, and that company had sub-let the construction thereof to J. S. Wolff & Son, and the trespass complained of had been done by said J. S. Wolff & Son or their employes. Upon the giving of these instructions, the plaintiff took a non-suit, which the court refused, on motion of plaintiff, to set aside. The case comes by appeal from this action of the court.

There was no evidence coming from either side to support a verdict on the two common law counts, no evidence

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of negligence or want of care of running the cars when the sheep were struck; no evidence of a trespass in throwing down fences which let in the cattle; the fences thrown down appearing to have been across the right of way which had passed to defendant. Neither is there any evidence that those fences which defendant had the right to take down were removed in a negligent or imprudent manner, so as to injure the rights of others. The plaintiff could not have been prejudiced by any instructions on these counts, and, therefore, it is unnecessary to review them. They could not have been more prejudicial than one to the effect that the plaintiff on the evidence could not recover on such counts, and an instruction of that import, if asked, ought to have been given.

The only question necessary for us to consider, involves the correctness of the instructions given for defendant, relating to the statutory actions contained in

**1. RAILROADS:** fences: killing the first and third counts. As already  
**stock: trespass of**  
**stock.** stated these instructions denied any right

of action on these counts before the road was completed, and before the defendant had commenced to run cars upon it for the carriage of freight and passengers for hire. This right of action need not be considered with reference to the effect of the contract of construction which was entered into with the Chicago & Alton Railroad. The effect of that contract was urged only in the instructions on the common law counts. We have considered the proposition contained in the instructions, and, in our judgment, it cannot be maintained either upon principle or authority. The 3rd section of the Railroad Act, after the amendment of 1877, more perfectly than before, was intended to afford protection to adjoining proprietors in respect to their stock and crops. The railroads were required to fence their tracks for two purposes. One was to prevent stock from straying on the track, the other was to prevent stock from trespassing upon the adjoining fields. Double damages were given to the owner of the stock killed on the track, and double



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damages given to the owners of the fields suffering from trespass of stock by reason of any failure to fence the road. It is true this statute also tended to secure passengers and employes of the road from accidents on the track, but the primary and moving object of the statute must have been for the benefit and protection of the parties designated in the statute as owners and proprietors of land and stock, to whom alone double damages were given for injuries and trespass thereto.

The fundamental rule which governs courts in the interpretation of statutes requires them to give such construction as shall, in the most complete manner, effect the known purpose and object of the statute, provided the language is adequate to afford such construction without violating the obvious meaning of its words and terms. In respect to the first count in the petition which relates solely to the killing of stock on the track, it is evident that no obligation rested on the company to erect any fences before it was possible for any stock to be killed by the engines or cars of the road. The owners of the stock could not be injured before the company commenced to operate engines and cars upon its track, and for that reason they needed no protection before that time. But after the company had begun to operate engines and cars on its road for any purpose whatever, the necessity of protection began; and if the purpose of the statute is to be maintained, the obligation to fence the road must also begin at the same time. The instruction of the court to the effect that it did not begin until the company was operating engines and cars on the track in the carriage of freight and passengers for hire, was clearly erroneous. It is the same thing to the owner whether his stock has been killed by a construction train or lightning express filled with passengers. There is nothing in the reason or language of the statute to justify the courts in postponing the statutory obligation of the company to fence the track, until it is receiving an income from the carriage of freight and passengers. In building a long road, its construction

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trains might be run for years before it commenced to carry freight and passengers for hire.

The learned counsel for defendant has cited the case of *Comings v. H. & Central M. R. R. Co.*, 48 Mo. 512, in support of his construction. This case will be noticed more particularly when we come to consider the third count. It is sufficient here to say, that the case was not for the killing of stock by the agents, engines or cars of the road. The court, upon the facts of that case, used the following language: "We think the reasonable construction of the statute is that it requires corporations to have their fences built at least as soon as they commence running their roads." The court does not intimate any exemption of the company from the obligation to fence while they are running one part of the road for the purpose of constructing another part.

In regard to the third count, which relates to damages suffered by reason of stock escaping from their inclosures and entering upon adjoining fields, the instruction that the liability of the company under the statute does not begin until the company has commenced to operate its engines and cars in the carriage of freight or passengers for hire, is equally erroneous. The obligation to build fences as a protection against such damages was not contained in the statutes of 1855. They contained only the provision against the killing of stock on the road. It was held, in the construction of this statute, that railroads were not under any obligation whatever to build fences to protect adjoining fields from incursions of stock. *Clark's Adm'r v. H. & St. Jo. R. R. Co.*, 36 Mo. 202. After this decision, the legislature added the provision to that effect, which, after the amendment of 1877, appears as section 809 of our present revision. We are unable to perceive why the duty to build fences for this purpose is not as imperative as for the purpose of preventing collisions with stock on the track. There is a marked distinction in the character, but not in the necessity of the two provisions.

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It will be observed that this provision, in question, has not, like the other, any necessary connection with the running of trains. As soon as the railroad removes the fence extending across its right of way, which it has lawful authority to remove in the construction of its road, the fields are thrown open to the incursions of stock. The necessity of a fence at that time is as urgent as we have seen it to be under the other provision when the road begins to operate its trains. The liability to damage and the necessity for the fence is created by the act of the company, and the statute would fall short of its admitted purpose, if it failed to impose the duty to fence as soon as this liability to injury was caused by the company. There is nothing in the language of the statute to indicate that the legislature intended to postpone this duty till the company had commenced to operate trains for any purpose at all. The clause providing that the land-owner may build the fence at the expense of the company if it neglects for three months after completion of the road to build the fence, does not purport to relieve the road from any responsibility for damages in the meantime. On the contrary, it is expressly recited that "until such fences, etc., are made, etc., such corporation shall be liable in double the amount of all damages," resulting from a want of fences.

In the case of *Comings v. H. & Central M. R. R. Co.*, 48 Mo. 512, the learned judge who wrote the opinion, did not assume to lay down any rule by which future cases could be governed. Following the supreme court of Vermont in *Clark v. Vermont R. R. Co.*, 28 Vt. 103, he holds that fences should be up at least as soon as cars commence running. He declines to rule as a matter of law, that they should be built before that time. Neither does he, as a matter of law, exempt the company from building before that time. Adopting the language of the case in Vermont he remarks: "Though we cannot say, as matter of law, that the defendants were bound to erect fences before or while they were constructing their road through any par-

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ticular land-holder's premises, yet we can say they must exercise their right with a prudent regard to the rights of others; and if lacking in this duty, they are chargeable with negligence and must answer for its consequences."

Of course, as a matter of law, no court would undertake to indicate the exact time at which the statutory liability for double damages would attach in respect to any particular portion of the road. The law does not require impossible or impracticable things under this statute. And the time for the liability to attach must necessarily vary according to the circumstances surrounding each case. When the fence across the highway is taken down at a given point, the materials to fence the adjoining fields may be at hand, or easily accessible, and as the necessity for the fence is apparent, the obligation of the statute ought to attach in its full force after a reasonable time has elapsed for building the fence. Again, there may be cases possibly in which it would be impossible or impracticable for the company to procure and transport material for building fences, before the track was ironed and equipped with rolling stock sufficient to carry the material to the point where it was wanted. In such cases the liability of the statute would not follow so close on the heels of the necessity as in the former case, but ought, as in that case, to attach after the lapse of a reasonable time for doing the thing required by the statute to be done. The obvious and rational rule of law governing both provisions of this statute is, that after the company, in the construction of its track, has given rise to the want of a fence, the liability of the statute for failure to build one will attach after a sufficient and reasonable length of time, according to the circumstances of each case, has elapsed to build one.

Whether, under the circumstances of any particular case, the company could have practically made the fence at the time of the damage, is a question for the jury to decide. There is nothing new in this rule. It has been already adopted in this as well as in other states, and applied to the

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liability of railroads under the same or similar statutes; which required the companies to maintain roads as well as to build fences. When by reason of a storm or other accident, the fence built by the road, is out of repair, the liability of the road for double damages does not attach at the instant of the accident, but only after a reasonable and sufficient time has elapsed for restoring it to its former condition. Thompson on Neg., 524; *Clardy v. St. Louis, I. M. & S. Ry Co.*, 73 Mo. 576.

In the case at bar the evidence of the plaintiff tended to prove that the road was constructed and completed through the plaintiff's lands in the month of May, 1878, at which time his fences were thrown down and his crops subjected to the incursions of stock; and that no fences were built by the company for his protection until sometime in the fall of the same year; that his sheep were killed by the trains in August, and that two-thirds of the damage to his crops occurred after completion of the road across his land. Whether, under the circumstances of this case, the company could easily have built their fence before the injuries complained of, was not considered by the court nor submitted to the jury. The court disposed of the whole matter by ruling that the liability of the company could not attach until it had commenced to operate trains for the carriage of freight and passengers for hire. This doctrine, in my judgment, is against reason, justice and authority.

As the case should be remanded for another trial, I will add a few words bearing on the effect of the contract 2. —: —: —: of construction which was entered into —: —: with the Chicago & Alton Railroad. There is nothing special in that contract requiring that company to build the fences as the road was constructed. And if there was it could not relieve the defendant from the duty of building or causing the fences to be built. The statute imposes this duty on the defendant, and the liability for a breach of it cannot be escaped by merely making a contract with another person to perform it—that other person

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in this case being a foreign corporation. *Shepard v. Buffalo R. R. Co.*, 35 N. Y. 641. It has been held in this State that in respect to those things which a railroad has the lawful right to perform, such as excavation on its right of way, taking down fences therein, etc., the company is exempt from liability for damages resulting from a negligent performance of the same by a contractor of the company or his employees, to whom the work or job has been given over by the company. *Clark's Adm'r v. H. & St. Jo. R. R. Co.*, 36 Mo. 202; *Ullman v. H. & St. Jo. R. R. Co.*, 67 Mo. 118. But there is a well settled exception to this rule in respect to the omission of a duty enjoined it by statute as the owner of property. Such duty cannot be escaped by an engagement with another to perform it. *Hole v. R. R. Co.*, 6 Hurl. & N. 488; *McCafferty v. R. R. Co.*, 61 N. Y. 178; *Ryder v. Thomas*, 13 Hun 296.

Upon the whole the conclusion is that this case should be reversed and remanded for trial in accordance with the principles expressed in this opinion. PHILIPS, C., concurs; WINSLOW, C., absent.

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PRIOR, Appellant, v. LAMBETH.

1. **Swamp Lands:** PUBLIC LANDS: PRIORITY OF PATENTS. A patent from the United States to the State of Missouri under the act of congress of September 28th, 1850, does not relate back to and become operative from the date of said act, so as to annul the title of a purchaser under an entry and patent subsequent to said act, but prior to any selection or designation of such land as swamp land by the Secretary of the Interior.
2. **Judgment in Ejectment:** ESTOPPEL. Upon a recovery by plaintiff in ejectment, defendant in pursuance of an agreement with the plaintiff turned over to the plaintiff his claims for rent against the tenants in satisfaction of the money portion of the judgment; *Held*, that the judgment and agreement did not estop defendant from maintaining ejectment against plaintiff for the same land.



*Appeal from Osage Circuit Court.—HON. A. J. SEAY, Judge.*

AFFIRMED.

*Edwin Silver* for appellant.

*L. C. Krauthoff* for respondent.

PHILIPS, C.—Action in ejectment to recover “the south fractional half of southeast fractional quarter (west of the Gasconade river) of section 3, township 43, north of range 7 west.” The answer tendered the general issue, and pleaded specially a former recovery by defendants in an action of ejectment against plaintiff, and that it was afterward agreed between them that if defendant here would not enforce the collection of plaintiff of the rental part of said judgment, the plaintiff, Lambeth, would surrender to Prior possession of said land, and that this proposal was accepted and acted on as a full settlement of this whole controversy, which settlement defendant pleads in estoppel. A jury being waived, the cause was tried by the court.

Plaintiff's title consisted of a certificate of entry for the land from the proper United States land office, of date March 13th, 1855, issued to one Christopher Hamilton; patent thereon to said Hamilton dated January 1st, 1862, and deed from Hamilton to plaintiff. Defendant claims that the land is what is commonly known as swamp or overflowed land, coming to the State of Missouri by virtue of the act of congress of date September 28th, 1850. It was patented to the State in January, 1863, and by the Governor of the State to Osage county in 1869, and by the county it was conveyed to the defendant in 1875.

The evidence touching its swampy character, and the steps taken by the authorities to determine its status, are briefly as follows: In 1851 the surveyor of Osage county filed in the office of the Secretary of State an affidavit stating that he had examined the southeast fractional quarter

of said section, and found the same to be swamp land; in 1853 the Surveyor General for Illinois and Missouri filed in the office of the Register of Lands of Missouri a list of swamp lands, including the southeast fractional quarter of said section west of the river Gasconade; in 1867 the Register of Lands for the State made out a certificate, which was filed in the office of the county clerk of Osage county, stating that said lands with others had been patented to the State.

The records in the land office at Washington City showed in substance, the following facts: In 1858 the Commissioner of the General Land Office certified to the Secretary of the Interior for his approval, under the Swamp Land Act, the following lands in said section: "Northwest quarter of northeast quarter, south fractional half of northeast quarter, north of the Gasconade river, and the northeast quarter of southeast quarter." This list was approved by the secretary in 1859. In 1866 a similar list was certified and approved embracing the northwest quarter of southeast quarter. The patent above referred to, from the United States to State of Missouri, described the lands as follows: "The northwest quarter of northeast quarter, the south fractional half, north of the river, and the northeast quarter of the southeast quarter of section 3, township 43, range 7." Defendant introduced a witness who testified that the land was swampy.

The only evidence relative to the estoppel set up in the answer, is the testimony of the plaintiff, who was introduced as a witness by defendant. It is as follows: "I asked Prior to let me off with the rents and profits in the other suit for this land, and he would not do it; Prior had a writ of possession and had rented the land to other parties; Prior and I then agreed that I should give Prior the rent due me, and he would let me off as to the judgment for rents and profits; I gave him my rent—one-third of the crops—and he released me from the money judgment; writ of possession was not then served on me; I gave Prior

possession because of the writ; I had to get out; he took my rent which was due me from the tenants to whom I had rented, and released the judgment for money; the sheriff had told me he had the writ." On cross-examination: "McClemens, who was my attorney, told Prior that he had no doubt of my title and could sue him at the next term of the court."

A number of instructions were requested and given and some refused. But as the trial was had before the court, and the conclusion reached by the court being, in our opinion, correct, it is unnecessary to review the instructions. The court found the issues for the plaintiff, and the defendant brings the case here on appeal.

I. The contention of appellant, defendant below, is that the land in controversy is swamp land, donated to the State by the well known act of congress of September 28th, 1850, providing for the reclamation of swamp and overflowed lands. 9 U. S. St. at Large, p. 519. He asserts that the act of congress operated as a grant *in praesenti* by which the title to such land passed *eo instanti*, to the State. Therefore, he contends that notwithstanding between the date of the act of congress and the subsequent segregation of the lands as swamp lands by the Secretary of the Interior, and the issue of the patent, the United States may have sold and patented the land as of the public domain to an individual, yet when the patent for the land in question issued to the State it had relation back to and became operative from the date of the act of 1850, so as to effectually cut out such intervening purchaser.

*French v. Fyan*, 93 U. S. 169, is cited in support of this proposition. It is worthy of observation that there it was a controversy between a claimant under the Swamp Land Act on the one side, and under the Pacific Railroad grant on the other. While the land was certified to the railroad company by the Secretary of the Interior in 1854, it was patented to the state as swamp land in 1857, five years before the purchaser under the railroad contracted

for it. So that the case was to be determined really on the right and claim of the state and the railroad as they stood in 1857, when the government patented the land to the state. Both of the claimants were donees—beneficiaries of the bounty of the government. And as no question of the rights of an intervening purchaser were involved, and as neither the acts of 1855 nor 1857, hereinafter referred to, applied, the court might well have held that the doctrine of relation obtained so that the patent to the state in 1857 took effect as of 1850.

But a more satisfactory answer, perhaps, may rest on the fact that the grant to the railroad was not, in the nature of the case, one *in praesenti*. It was necessarily made to depend upon the future location of the road. Until the location was definitely fixed it was impossible to know what sections of land would be touched, on which the designation of the alternate sections would depend. Coupled too with the railroad grant was a proviso excepting from its operations "all lands heretofore reserved by any act of congress, or in any manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatever." This excluded from the railroad grant, the lands covered by the acts of 1850. *Railroad Co. v. Smith*, 9 Wall. 95, 97, 98.

In construing the act of 1850 the whole act must be considered together. The first section standing alone would seem, *ipso facto*, to vest the lands in the state without more. But the second section makes it the duty of the Secretary of the Interior, on evidence manifestly to be obtained by him through surveys and other reliable sources, to make out accurate lists and plats of the lands, designating them as swamp and overflowed. The third section provides that in making said lists, where the greater part of a subdivision is wet and unsuited for cultivation, the whole of it shall be included in such lists and plats. Manifestly there are prescribed in the act things to be done by the head of the interior department, and by him alone, before the grant is

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ascertained and defined. This, therefore, in the very logic of the case, is a precedent act.

So Justice Miller, (who wrote the opinion in *French v. Fyan, supra*.) in the latter case of *Martin v. Marks*, 97 U. S. 347, 348, says: "These selections, though approved by the Surveyor General, who was merely a local officer, still lacked the authentication of the Secretary of the Interior, to whom alone congress has confided the duty of confirming them, or making them for himself." "The act of 1850 was a present grant subject to identification of the specific parcels coming within the description."

This also is the construction placed on this act by the courts of the states concerned in the swamp land grant, which certainly could have no interest to hinder the operation thereof by making it dependent on the action of a government officer beyond their jurisdiction. *Morgan v. R. R. Co.*, 63 Mo. 129; *Funkhouser v. Peck*, 67 Mo. 19; *Stephenson v. Stephenson*, 71 Mo. 127; *Funston v. Metcalf*, 40 Miss. 504; *Thompson v. Prince*, 67 Ill. 281. These cases hold in effect that the selection or designation to be made by the Secretary of the Interior was the act of segregation essential to the consummation of the grant. We would not be understood as holding that it is in the power of this departmental officer to deny to the state the benefit of the government's bounty by wantonly or arbitrarily withholding his approval. Like any other officer upon whom a public duty is imposed by law, he is amenable to the law and subject to the jurisdiction of the proper courts.

It is manifest from the record proofs in this case that the Secretary of the Interior never did list and plat or approve the land in controversy as swamp land. He recognized and listed the balance of this section as swamp land, but from some cause omitted the land in suit. Neither is there any evidence that it was ever called to his attention, by evidence or report, as being swampy or overflowed, prior to Hamilton's entry in 1855. Whether the knowledge conveyed to him by the records in his department, of

the fact of Hamilton's purchase induced the withholding of the secretary's approval, is conjectural, but is not improbable. It is quite clear from the letter of the Commissioner of the General Land Office read in evidence that the land listed, platted and approved as swamp land by the Secretary of the Interior did not embrace the south fractional half of southeast fractional quarter of said section; but it in fact was the south fractional half of northeast quarter.

In the patent to the State, subsequent to Hamilton's entry and patent, it is described as the south fractional half north of the river, whereas the land is west of the river. Waiving any discussion of the sufficiency of this description to convey the land in suit, the evidence proves conclusively that Hamilton entered the land on the 13th day of March, 1855, and received a patent therefor on the 1st day of January, 1862, prior to the issue of the patent to the State, which is the only evidence defendant can assert of any designation by the Secretary of the Interior of the land as swamp land.

Now, it is a matter of public history, recognized in departmental, legislative and judicial records and proceedings, that between the time of the passage of the Swamp Land Act and the selection and approval by the Secretary of the Interior, the purchase of such lands by private citizens, both from the State and the United States, became frequent, and led to so much uncertainty, conflict and anxiety about the titles, that on the 2nd day of March, 1855, the congress of the United States, out of a proper regard to the equities involved, and as a means of adjustment, passed the act "for the relief of purchasers and locators of swamp and overflowed lands." This act contained but two sections. The first directed as soon as practicable the President should have patents issued to the purchasers and locators of lands claimed as swamp lands, prior to the issue of patents to the states, with the exception that where the states had made sales before entry under the laws of the



United States, no patent should be issued until the state released; but if the states omitted for ninety days to forward lists of the lands so sold, then patents should issue without delay. The 2nd section made provision for indemnity to the states by directing that the purchase money in cash sales, by the United States, should be paid over to the states, and in case of locations by warrants the states should have in lieu thereof other lands, subject to entry, to be selected by the state.

As Hamilton did not make his entry until eleven days after the passage of this act, its provisions, which were retroactive, did not apply to his case. But on the 3rd day of March, 1857, congress passed an additional act to confirm to the states the swamp lands "selected under the act of 1850." It declared that the selection of swamp lands theretofore made and reported to the General Land Office, and remaining vacant and unappropriated, and not interfered with by actual settlement under any existing law of the United States, was thereby confirmed, etc. But it was expressly declared and reserved that the provisions of the act of 1855 should continue in force and apply to all entries of lands claimed as swamp lands, made since its passage. Hamilton's entry was thus preserved and protected by the act of 1857. *Funkhouser v. Peck*, 67 Mo. 19 to 36; *Funston v. Metcalf*, 40 Miss. 504; *Dale v. Turner*, 34 Mich. 405, 415. This Michigan case is a clear and able review of this question and fully sustains this opinion.

The legislature of Missouri, by repeated enactments, has indicated to the government of the United States its acceptance of the provisions of the acts of Congress in question. Act of December 13th, 1855, Local Laws 1855, p. 361; Acts of 1865, pp. 130, 131; Acts of 1867, p. 122. It was perfectly competent for the federal and state governments, the parties to the grant, where it did not, as in the case at bar, conflict with any intervening right, to make the agreement contained in the provision of the acts of 1855 and 1857. *Dale v. Turner*, *supra*, 416. It may be as

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well to observe that these confirmatory acts are in perfect accord with the doctrine that the act of 1850 was a grant *in praesenti*, becoming operative therefrom, by relation, after the lands have been designated and approved by the secretary. Acts of confirmation are favored by the judicial department of government, as the rights of *bona fide* purchasers and settlers on public lands are deserving objects of legislative and judicial protection. It follows that as there had been no selection of this land, as swamp land, prior to Hamilton's entry, nor indeed prior to the issue of his patent, the plaintiff's title is fully protected by the acts of 1855 and 1857, and the judgment below was for the right party on this issue.

II. As to the matter of estoppel, so called, pleaded by the defendant, it is sufficient to say it is not sustained by the proof. There was no surrender of the possession of the land in consideration of forbearing to enforce the payment of accrued rents. The evidence shows only that this part of the judgment was set off, by agreement, by the defendant in that action turning over to the plaintiff there—defendant here—the claim he had against the tenant of the land for rent money. The explicit statement of the plaintiff touching this matter was: "I gave Prior possession because of the writ," which the sheriff then had. The defendant having seen fit to introduce the plaintiff as his sole witness on this point, ought not to complain if his statement was fatal to his claim.

The judgment of the circuit court is affirmed. All concur.

THE TOWN OF CARROLLTON V. RHOMBERG, *Appellant*.

1. **Appeals.** An appeal lies from the mayor's court of the town of Carrollton in all cases.
2. ——— : **JUSTICE'S COURT : ABATEMENT OF ACTION.** The perfecting of an appeal from the judgment of a justice of the peace divests the judgment of its legal effect, and if the case be one in which the cause of action does not survive, upon the death of the party before the entering of a lawful judgment in the appellate court, the action will abate.
3. **Abatement.** A prosecution for violation of a city ordinance abates upon the death of the defendant.

*Appeal from Carroll Circuit Court.*—HON. E. J. BROADDUS,  
Judge.

REVERSED.

*Hale & Son* for appellant.

*Shewalter & Sebre & Mirick* for respondent.

MARTIN, C.—This was a prosecution commenced in the mayor's court of the town of Carrollton against Hieronymus Rhomberg on the 19th day of November, 1877, wherein he was charged with violation of a city ordinance prohibiting the sale of liquor on Sunday. He was found guilty and fined \$10. He in due time appealed to the circuit court, where his appearance was entered. The prosecutor moved that the appeal be dismissed on the ground that no appeal from the mayor's court was provided for by law. The motion was sustained by the court and judgment of dismissal entered, together with a judgment for costs. This was done in December, 1878. From this judgment of dismissal the defendant appealed to this court. In February, 1883, while his appeal was pending here, he died and his administrator was made a party. The death of the original defendant is pleaded here in abatement of the prosecution.

In our opinion the circuit court erred in holding that

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the defendant could not appeal from the judgment against him in the mayor's court. The 25th section of the amended charter of Carrollton reads as follows:

**Section 25.** The mayor shall have, within the limits of the town, all the powers and jurisdiction vested in justices of the peace in civil and criminal cases, and shall perform and exercise all the powers and duties enjoined on justices of the peace in similar matters and in like manner, and he shall be entitled to similar fees, and all his proceedings shall be under the same government and control as the proceedings of justices of the peace in like cases, and appeals to the circuit court may be taken in like manner as appeals in justices' courts. The mayor shall have jurisdiction in all cases arising under this act, and under all ordinances made in accordance with this act. He may issue his warrant and cause to be apprehended and brought to summary trial any person accused of transgressing any of the town ordinances. He shall grant the accused the right to be tried by six competent jurors, who, if they find him guilty, shall assess his fine according to the ordinances, and if any person fined, as aforesaid, refuse to pay his fine, the mayor may sentence him to be imprisoned not exceeding ten days. Fines, penalties and forfeitures accruing to said town may be recovered in the summary manner aforesaid, or they may be recovered by an action of debt in the mayor's court, or any court of competent jurisdiction.

The city provides for appeals also in its ordinances. Section 28 of ordinance No. 1 of said town, was read in evidence on the hearing:

**Section 28.** Any person fined under any of the ordinances of the town may prosecute an appeal to the circuit court of Carroll county, on complying with the regulations concerning appeals now prescribed by the State law in cases of appeals taken from justices' courts.

We think the phrase "and appeals to the circuit court may be taken in like manner as appeals in justices' courts," was intended to apply to all cases of which the mayor had

jurisdiction, whether under the ordinances or under the law defining the jurisdiction of a justice of the peace. Any other construction would lead to the manifest injustice of giving the right of appeal when only a few dollars are involved in the proceeding and denying it when the personal liberty of the citizen is at stake.

The accused being entitled to an appeal, his case ought to have been tried *de novo* in the circuit court, instead of being dismissed. When an appeal is taken from a justice's judgment, the perfecting of the appeal divests the judgment or its legal effect, the upper court becomes possessed of the cause and must enter a judgment of its own, disregarding the evidence and rulings of the justice. *Turner v. Northcut*, 9 Mo. 252.

As the circuit court in this case refused to go on with the case legally pending before it, and the defendant who was found guilty has died before any new trial, the suit will have to abate. If he was still living the cause would be remanded to the circuit court, with directions to proceed in the trial of it.

But we are of the opinion that the offense or cause of action cannot be proceeded with as surviving against the personal representative of the accused. It is unnecessary to consider the question whether this is a criminal or a civil proceeding, for under neither view of it could the case be proceeded with. If it is a criminal proceeding it abates as a matter of course. *State v. Perrine*, 56 Mo. 602. If it is a civil suit it is neither an action *ex contractu* nor an action for "wrongs done to the property, rights or interests of another," within the meaning of our laws so as to survive against the representative of the wrongdoer. R S. 1879, §§ 95, 96. It has been held by this court that a prosecution of this character is a civil action in form, although *quasi* criminal in its nature. *Kansas City v. Clark*, 68 Mo. 588. Its object is to recover a penalty to be imposed by a court for the violation of a city ordinance enacted to promote the public welfare. Viewed in this light it clearly

2. —: justice's  
court: abatement  
of action.

3. ABATEMENT.

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does not survive as against the representatives of the guilty party.

The judgment of the circuit court dismissing the appeal is reversed, and an abatement of the suit is ordered on account of the death of the original defendant. All concur.

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MEADER V. MALCOLM, *Appellant*.

1. **Pleading: REPLY: ESTOPPEL.** When the case has been tried as if a reply was on file and the evidence has been closed, the fact that there is no reply will not be taken as an admission of the new matter in the answer.
2. **Partnership: NOTE OF INDIVIDUAL, OR FIRM: EVIDENCE.** In an action on a note given in the name of a firm, one of the partners pleaded that the note was given by his co-partner for individual purposes and in fraud of the firm, and in support of his plea gave evidence showing that this note was given in lieu of a former individual note of the co-partner. Against his objection the plaintiff was then allowed to show the real consideration of this latter note. *Held*, no error.
3. —: —. Money was borrowed on the credit of a firm and used for the purposes of the firm, but the individual note of one of the partners was given for it, and by mistake of the lender was accepted. Afterward, when the mistake was discovered, the lender demanded and received from that partner the note of the firm in lieu of his own note. *Held*, that this was not the giving of a partnership note for an individual debt, and that the latter note was binding on the firm.

*Appeal from Phelps Circuit Court.*—HON. H. V. B. HILL,  
Judge.

**AFFIRMED.**

*L. F. Parker* for appellant.

*E. Y. Mitchell* for respondent.



NORTON, J.—This is an action on a promissory note for \$500; and the petition, which is in usual form, alleges the execution and delivery of the note by defendants as partners under the firm name of Demuth & Malcolm.

Defendant Demuth made default, and defendant Malcolm answered, denying the execution of the note in suit in the firm name of Demuth & Malcolm, admitting defendants were, on the 8th day of June, 1878, a firm doing business in Rolla, Missouri, under the firm name of Demuth & Malcolm, and pleading that the note in suit was executed by Demuth in the firm name, in fraud of the rights of the firm and of the defendant Malcolm, without his knowledge, consent or authority; that no consideration moved either to the firm or defendant Malcolm, but the sole consideration for said note was the payment of a private debt due from Demuth to plaintiff, and was executed, not for the purposes of the co-partnership, but for Demuth's private debt and in payment thereof, and that plaintiff knew of all said facts. To this answer there was no replication.

On the trial of the cause plaintiff had judgment, from which defendant Malcolm has appealed to this court, and

1. PLEADING; reply: assigns among other errors the action of estoppel. the court in refusing to instruct the jury that under the pleadings and evidence the plaintiff could not recover against defendant Malcolm. It is insisted that the above instruction should have been given, because no replication having been filed to the answer of defendant Malcolm, the facts therein stated were admitted. This position is overthrown by the case of *Henslee v. Cannefax*, 49 Mo. 295, where it was held that where a case had been tried as if a replication had been filed, and the evidence closed, it was error for the trial court to instruct the jury that the allegations of new matter contained in the answer must be taken as true for want of a replication.

But two witnesses were examined, viz., defendant Demuth, on the part of defendant Malcolm, and plaintiff in

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her own behalf. The note sued upon was read to the jury and was *prima facie* binding upon the firm, and to rebut this Demuth was examined as a witness. His evidence tended to show that he was the managing partner of the firm, and that in June or July, 1876, without the knowledge of Malcolm, he borrowed the money of plaintiff, telling her that he could use it for the firm if she would let *us* have it, that she gave him a check for the money, and he gave her his individual note for the amount borrowed; that the money thus obtained was applied by him to the payment of debts which the partnership owed, that he took credit on his own individual account on the books of the firm for the amount borrowed, intending to charge himself with the amount when the firm paid it; that the note was payable in six months, and when it became due he paid the interest on it, and subsequently thereto gave her his note for \$500; plaintiff paying him the difference between four and five hundred dollars; that witness told plaintiff that the money for which the original note was given had gone to pay the debts of the firm.

The evidence of plaintiff in rebuttal tended to show that plaintiff had business transactions with the firm of Demuth & Malcolm; that in June, 1876, Demuth asked plaintiff if she had money in bank, and told her that the firm could use it, and she could have it back in six months; that he came to her a few days after, and she gave him a check for between four and five hundred dollars, and he gave his note to her for the same; that she did not read the note at the time; that afterward, about Christmas, 1877, she learned for the first time that the note was signed by Demuth alone, and told him he ought to have signed it in the firm name; that she had confidence in Demuth; was of French descent and could not read English readily; that she requested Demuth to sign the firm name as soon as she learned it had not been so signed; that the note in suit was executed about six months afterward, and nothing was said at that time; that she loaned the money to the firm, and

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gave the firm credit therefor at the time the loan was made.

It is contended by counsel that the court erred in allowing plaintiff, over the objection of defendant, to testify in regard to the original transaction, which resulted in the loan of the money, and the execution of  
2. PARTNERSHIP: note of individual, or firm: evidence. Demuth's individual note for the amount. This, we think, was a legitimate subject of inquiry, and was made so by the evidence of Demuth, a witness introduced by defendant, who detailed all the circumstances which gave origin to the note in suit, and no reason is perceived why the plaintiff should not have been allowed to testify in regard to the same matter. It is clearly shown by the evidence of Demuth that the loan of the money was applied for, not as an individual loan to him, but as a loan to the firm and for the use of the firm. He states that he told plaintiff "that the firm could use the money if she would let us have it, and that she should have it back in six months." He further stated that the money obtained went to the benefit of the firm and was actually applied to the payment of the debts of the firm. It is true he states that he took credit to himself on the books of the firm, but it is not shown that plaintiff either had knowledge or consented to this. On the contrary, she testifies that the loan was made to the firm, and that as soon as she ascertained that Demuth had not signed the firm name to the note given by him, she demanded the firm note, which he afterward gave and which is the note in suit.

It is also insisted by counsel that Demuth having executed his individual note for the money borrowed, it thereby  
 s. —: —. became his individual debt, and that the note in suit having been executed in discharge of said note, the firm is not bound thereby. No principle is better settled than that when a member of a firm executes the note of the firm for the payment of his individual debt, such note is not binding on the firm. Parsons on Part., 111, 203 *et seq.* But this principle, in the light of the evidence in

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this case, has no application, for the reason that the money for which the partnership note was given was borrowed, according to defendant's own evidence, not for the use of the individual partner, but for the use of the firm, and that it was as a matter of fact applied to the payment of the debts of the firm. Defendant's witness swears that he applied for the loan for the firm, and plaintiff swears that she lent it to the firm. So that it may be said notwithstanding the fact that Demuth, who applied for the loan on behalf of the firm, executed his own note, it did not thereby become his own private debt so as to make the subsequent note executed by him in the name of the firm a fraud upon the firm. The question as to whether the loan was originally made to the firm or not, was fairly submitted in the instructions to the jury, and the facts, as disclosed both by the evidence of Demuth, the active member of the firm who borrowed the money, and by that of plaintiff, leave no doubt in our minds that Demuth applied for the loan on behalf of the firm, and that plaintiff made the loan on that application, and the money went into the business of the firm.

It may be true, as contended by counsel, that if plaintiff had sued the firm on the note executed by Demuth alone, under the ruling of this court in the case of *Farmers' Bank v. Bayless*, 35 Mo. 428, that the action could not have been maintained. But that is not this case. The plaintiff, instead of affirming the note executed by Demuth in his own name, as soon as she ascertained that it was so executed, repudiated the transaction and required of Demuth the execution of a firm note, not in payment of his, Demuth's, own note, but in conformity with the real facts of the case and the understanding of the parties at the time the loan was made. The instructions given in the case were in conformity to the views above expressed, and those refused were not. Judgment affirmed. All concur.

THE STATE V. KING, *Appellant*.

1. **Criminal Law: EVIDENCE OF DEFENDANT'S GOOD CHARACTER.** In a criminal prosecution evidence of the good character of the defendant is always admissible; but the law limits the inquiry to his general character as to the trait in issue; a witness will not be allowed to express his individual opinion.
2. **An Instruction** objected to as leaving it to the jury to determine what were the material allegations in the indictment; *Held*, not properly open to that objection.
3. **Criminal Law: PRESUMPTION OF GUILT ARISING FROM FLIGHT.** Flight from a charge of crime raises a presumption of guilt; but this presumption may be modified or overthrown by evidence showing that the flight was occasioned by other causes than consciousness of guilt, and when there is such evidence the jury should be directed to consider it and determine how far it tends to rebut the presumption.
4. ———: **REASONABLE PROVOCATION: HEAT OF PASSION.** The insulting conduct proven in this case was not such as to constitute reasonable provocation, so that the defendant could not have been in a heat of passion when he committed the assault.

*Appeal from Johnson Criminal Court.*—HON. J. E. RYLAND,  
Judge.

REVERSED.

*J. J. Cockrell and Sam'l P. Sparks* for appellant.

*D. H. McIntyre*, Attorney General, for the State.

HOUGH, C. J.—The defendant was indicted for a felonious assault, and was convicted, in the language of the verdict, "of maiming, wounding, disfiguring and endangering the life of one S. D. Fuller, without intent to kill," and was fined \$125.

The following extract from the defendant's testimony states the circumstances of the assault: "I was helping Mr. G. W. Ford to thresh on the 6th of last August, 1880. I was pitching wheat from the stack to the feed-table; we had finished the stack on the south side, and I was the only

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one pitching to the table on the north side. I went to the edge of the stack to get a drink of water, and while there I took a drink of whisky, and then a drink of water. While there, Dyer, who was feeding, got out of wheat and called for more wheat, and I then ran back and threw several bundles up. Then Fuller yelled something to the darkey, and I called him and asked him what he said, and he told me he had told the darkey (Dyer) "to knock them bundles off and to knock them to hell, by God," and I said may be you had better get up there and knock them off, and he said 'God damn your soul I can,' and I said 'God damn your soul, if you do I'll knock you down.' He then got up on the foot-board in Dyer's place and I threw four bundles up. There were no bundles there when he got up. He knocked off two bundles and fed two, and then I knocked him off with the pitchfork. I hit him with the tines with just what force I thought would knock him off. I could have hit him with the handle or thrust the tines into him."

At the trial a witness for the State, who stated that he had known the defendant for several years, and had personal knowledge of his character, but did not know his reputation in the neighborhood where he resided, was asked on cross-examination to state what the character of the defendant was for being a peaceable law-abiding citizen, and the court refused to permit the witness to answer the question. This ruling of the court is assigned for error. We are of opinion the court properly excluded the testimony offered. In a criminal prosecution, the good character of a defendant is always admissible, but the law limits the inquiry in such cases to his general character as to the trait in issue. *State v. Dalton*, 27 Mo. 12; *Wharton's Crim. Ev.*, § 58; *Taylor's Ev.*, (7 Ed.) §§ 350, 351; 3 *Greenleaf Ev.*, § 25. The mere opinion of the witness is not admissible. His experience and observation may not accord with the general repute.

It is also urged that the court erred in giving the fol-

1. CRIMINAL LAW:  
evidence of defendant's good character.



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lowing instruction: "It devolves upon the State to affirm-  
 2. AN INSTRUCTION. atively prove to the satisfaction of the jury every material allegation in the indictment herein, and unless the State has so proven, to the satisfaction of the jury beyond a reasonable doubt, that defendant made the assault upon Fuller as charged in the indictment, with a deadly weapon, with malice aforethought and with the intent to kill and murder the said Fuller, then they should find the defendant not guilty as charged in said indictment." The objection is that the jury are left to determine what are the material allegations in the indictment, and the instruction, therefore, submits to them a question of law. We do not think the instruction, when fairly considered as a whole, is obnoxious to the objection urged. The court designates in the instruction the material allegations which the State must prove, and the instruction is evidently worded with a view of informing the jury that the facts required to be found constitute the material allegations referred to.

As the defendant was found guilty under other instructions of an assault with intent to kill, we would not have noticed this instruction, but for the fact, that for reasons hereinafter given the judgment must be reversed.

The following instruction is also complained of: "Flight raises the presumption of guilt; and if the jury believe  
 3. CRIMINAL LAW: from the evidence that defendant, after the  
 presumption of commission of the assault alleged, fled the  
 guilt arising from country and tried to avoid arrest and trial,  
 flight. they may take this fact into consideration in determining his guilt or innocence." This instruction is in harmony with the views heretofore expressed by this court in the *State v. Phillips and Ross*, 24 Mo. 475, and the *State v. Williams*, 54 Mo. 170. It does not direct the jury as to the weight to be attached to the inference of guilt arising from flight and the effort to avoid arrest and trial. That is a matter for the jury, and is to be determined by them in connection with the other facts and circumstances in evidence. The presumption or inference of guilt arising from flight may

be modified or overthrown by testimony showing that the flight of the defendant was occasioned by other causes than consciousness of guilt; and where the testimony discloses circumstances explaining or excusing flight which consist with the innocence of the defendant of the crime charged, the jury should be directed to consider the same in connection with the presumption arising from flight, and determine how far they tend to rebut such presumption. *State v. Mallon*, 75 Mo. 355; Wharton Crim. Ev., § 750. There were facts in this case explaining the defendant's flight to which the attention of the jury might have very properly been called, leaving the weight to be attached to the same, of course, to the jury.

The instructions on which the verdict of the jury is predicated, are as follows:

8. The killing of another in a heat of passion, without a design to effect death, by a dangerous weapon, in any <sup>4. —: reasonable</sup> case except such wherein the killing of another is justifiable or excusable, is manslaughter in the third degree. \* \* (Here follows a definition of justifiable and excusable homicide which is unimportant in this case, and is, therefore, omitted.)

9. If the jury believe from the evidence that S. D. Fuller was maimed, wounded or disfigured, or received great bodily harm, or his life was endangered by the act, procurement or culpable negligence of the defendant under such circumstances as would have constituted manslaughter, as before defined, if death had ensued, they will find the defendant guilty, and assess his punishment at imprisonment in the penitentiary not less than two nor more than five years, or imprisonment in the county jail not less than six nor more than twelve months, or a fine of not less than \$100 nor more than \$1,000, or both a fine of not less than \$100 nor more than \$1,000, and imprisonment in the county jail not less than three months nor more than twelve months.

In the first of these instructions (number eight) heat

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of passion is not defined, nor were the jury informed as to what is a lawful or reasonable provocation. *State v. Charles Ellis*, 74 Mo. 207. But these omissions are minor faults. The instruction is radically wrong in this case because there is no testimony to support it. The insulting conduct of Fuller, which occasioned the blow inflicted by the defendant, did not constitute reasonable provocation, and there could not, therefore, be any technical heat of passion. *State v. Ellis*, *supra*.

Other questions were presented in argument, but the disposition we have made of the case renders it unnecessary to advert to them. The court properly instructed the jury as to the law of common assault and battery, under section 1655 of the Revised Statutes.

For the errors indicated the judgment of the criminal court of Johnson county will be reversed and the cause remanded. The other judges concur.

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ALDRIDGE'S ADM'R V. THE MIDLAND BLAST FURNACE COMPANY, *Appellant*.

1. **Declarations of an Agent** made one hour after the occurrence to which they related; *Held*, no part of the *res gestae*, and not admissible in evidence against his principal.
2. **Master and Servant: INJURIES FROM PATENT DANGERS.** If a servant knows of the danger in prosecuting his master's work, or if it is so patent that an ordinarily observant man would have seen it, and without any assurance from the master he continues at work, he cannot hold the master liable if injury result to him therefrom. Compare *Flynn v. K. C., St. Jo. & C. B. R. R. Co.*, *ante*, p. 195.

*Appeal from Phelps Circuit Court.*—HON. H. V. B. HILL,  
Judge.

REVERSED.

A. & J. F. Lee, Jr., for appellant.

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Aldridge's Adm'r v. The Midland Blast Furnace Company.

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*Smith & Krauthoff* and *L. Judson* for respondent.

HENRY, J.—This is an action brought in the circuit court of Dent county by E. N. Aldridge against the Midland Blast Furnace Company, for personal injuries received by him June 23rd, 1877, while working in an iron-ore bank of defendant, in Dent county. The cause was removed by change of venue to Phelps county, and the trial begun on plaintiff's amended petition. The amended petition stated that while plaintiff was at work by defendant's direction in the Millsap bank at the foot of an embankment or wall of earth, four feet back from the face of which was a crevice partially separating the embankment from the body of the surrounding earth, the embankment fell upon and injured him by reason of defendant's failure to secure it by the use of shores or props; that plaintiff was ignorant of the crevice and defendant was not. The answer was a general denial, and a special defense of compromise and satisfaction of plaintiff's demand by the payment of \$150 to him by defendant, which he accepted in full satisfaction of all demands on account of the injuries received by him. On a trial plaintiff had judgment for \$500, from which defendant has appealed.

It was admitted that defendant was the owner of the Millsap bank, and that F. C. Griffin was the agent and vice-principal of defendant; that the business of mining is dangerous and hazardous. The evidence for plaintiff tended to prove that he was employed to work at said bank about three days before the accident, but had not worked upon the embankment before that day, and only an hour before it caved in on him; that he was employed as a miner by Griffin, and directed by him to assist in shoveling dirt near the foot of the embankment, undermining it, in order to cause it to fall into the excavation, and plaintiff knew the object in undermining it. At the time Griffin ordered plaintiff to work, there was a blind seam of clay four feet

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back from said face, in which there was a crevice or crack four inches wide and running parallel with said face for its whole length to a point separating said bank from the adjacent earth, which increased the danger of operating said mine; it was known to Griffin and unknown to plaintiff. Griffin was not in the cut nor on the bank from the time he ordered plaintiff to begin work until after plaintiff was injured.

Hicks, a fellow-servant of plaintiff, testified that he was on the top of said bank that evening before the accident, at three o'clock, and saw a crack four feet from the face, as the face was when he saw it, and he went down and told the crowd at work at the foot of it; he spoke particularly to Henry Graff, another fellow-servant of plaintiff, and Graff heard him, but plaintiff did not; he told them it was dangerous to work there. He testified that the bank was dangerous without the crevice, and any one could see that it was dangerous; that he was picking at the foot of the bank which fell, on the evening before the accident, and also for a short while on the morning of the accident; but being aware of the danger that the bank would fall, he gave his pick to Graff; then Graff continued to undermine the bank with his pick, the plaintiff shoveling the dirt after Graff, and about two feet from him.

William J. Hill, another witness for plaintiff, a miner of twenty years' experience, testified that he was at work at the bank when the accident occurred, about 100 yards from plaintiff; that he was at work about twenty minutes before the accident; that it was unsafe to work under a bank of the height and materials that bank was composed of; and it was so considered among miners; any experienced miner could see, by looking at the bank, that it was dangerous; some miners take risks which others will not take.

The plaintiff offered evidence tending to prove that he was able-bodied before he was hurt; that Graff continued to undermine the bank, and upon digging out a piece of stone or ore, the bank slid down upon plaintiff and upon

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Graff; that Griffin was in the cut immediately after the accident, and helped to uncover plaintiff, and sent to town for a buggy and a doctor. The town was from one-quarter to half a mile from the Millsap bank. The doctor came and found the plaintiff lying on the ground. Plaintiff was then put in a buggy and carried to his house; that when plaintiff was being carried to his house he was borne opposite the store of one Samuel Morrison, who being sworn on the part of plaintiff, testified that he was a stove and tin merchant, and lived in the town of Salem; that after Aldridge was carried past his store, where Morrison then was, Morrison went immediately up to the Millsap bank, and arrived there about one hour after the accident; that he found Griffin at the bank, but not in the cut, about thirty feet from where the accident took place; Griffin did not appear excited, but seemed to be troubled.

Plaintiff's counsel then asked the witness, Morrison, the following question:

Ques. State if you had any conversation with Griffin at that time, about the accident and its cause, and if so, what that conversation was. Defendant objected to the question because the same was irrelevant and incompetent, and could not bind the defendant; that the agency of Griffin had ceased, and his statements made after the accident were not admissible because the same were hearsay. The objection was overruled, and defendant excepted to the ruling. Morrison, answering, said that he did have a conversation at that time, and in that conversation Griffin said he had just come from town before the accident, and had seen the bank hanging there, and knew it ought to come down, and was dangerous; but he thought it would hang until he could go to the shop and return, and while he was gone it fell; that the shop was 100 yards from the place of the accident.

On behalf of defendant evidence was introduced tending to prove that the Millsap bank was similar to other banks in the neighborhood; that they all have blind seams



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of clay, not perceptible on the surface; that these banks are slippery and often produce slides when not guarded against; that in undermining an embankment to get a fall of dirt, into the excavation, the safer mode is either to blast from behind with powder and blow off the face of the banks, or to undermine, leaving steps or benches at the end, about every twenty feet, to support the bank and afterward to knock them out and let the earth fall into the excavation, and that the latter was a very common method with miners.

The following instructions were given for plaintiff, to which defendant excepted:

2. If the jury believe from the evidence that the bank of earth was in an unsafe condition, and that its condition was known, or might have been known, to Griffin, the superintendent of the mine, by the use of due diligence, and that its unsafe condition was not known to plaintiff, and that the said bank of earth slid or fell upon plaintiff, whereby he was injured, the jury will find the issues for plaintiff.

3. If the jury believe from the evidence that mining in defendant's mine was a hazardous business, then it was the duty of defendant to use every reasonable precaution to insure the safety of its employes; and if the jury find from the evidence that the bank of earth in said mine, described in the petition, slid and fell upon plaintiff, whereby he was injured, and that defendant did not use reasonable precaution under all the circumstances to insure plaintiff from injury by a fall of said bank of earth, or that defendant was careless and negligent in its mode and manner of working the bank of earth, and that said carelessness caused the injury, then the jury should find the issues for plaintiff.

The admission of the evidence of Morrison was a fatal error. It was hearsay evidence. The statements made by

Griffin were, in no sense, a part of the *res gestae*. After Aldridge was injured, a physician, who resided one-fourth of a mile from the bank, was sent for, and went to the bank, and had Aldridge put

1. DECLARATIONS OF  
AN AGENT.

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into a buggy, which passed Morrison's store, conveying Aldridge to his residence, and immediately after it passed, but about an hour after the accident, Morrison went to the bank, and had the conversation with Griffin which he was permitted to relate to the jury. The question of what is admissible as a part of the *res gestae* was fully discussed in the case of *McDermott v. H. & St. Jo. R. R. Co.*, 73 Mo. 516; and adhering to the doctrines there announced, we hold the testimony of Morrison inadmissible.

Instruction numbered three, given at plaintiff's instance, is erroneous, in that it wholly ignores the question of plaintiff's intestate's knowledge of the condition of the bank, which rendered it extra-hazardous to prosecute the work he was engaged in. There was testimony tending to prove that the Millsap bank was in a dangerous condition, without the crevice or seam in the clay, and that it was apparent to any one; and it should have been submitted to the jury to find from the evidence, whether that danger was so patent that an ordinarily observant man, whether experienced in the business or not, would have observed it. Nor is there any conflict between the proposition, that under such circumstances the employer would not be liable, and the doctrine announced in the *Porter case*, 71 Mo. 67, that "It is not incumbent upon the servant to search for latent defects in machinery or implements furnished him by his employer, and he has the right to assume that they are safe and sufficient for the purpose."

Although contributory negligence was not pleaded, yet one of the constituents of the cause of action stated in the petition is the allegation that, being ignorant of the extra-hazardous character of the work the deceased was ordered by defendant's vice-principal, who was aware of that danger, to proceed to work on the embankment. This alleged ignorance of the deceased was denied by the answer, and was, therefore, fairly and legitimately in issue; and if he did know of the existence of the seam, or crevice, and the

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consequent danger, or if it was so patent that an ordinarily observant person, whether miner or not, would have discovered it, within the time deceased was at work on the bank, then such opportunity to know it would be held as knowledge, whether in fact he knew it or not, and in either case his employer would not be liable.

There is another class of cases to be distinguished from the cases supposed in the immediately preceding paragraph. They are those where, although the defect or imperfection is apparent, the employe proceeds to work, on an assurance given by the employer, that it is safe to do so. *McGowan v. R. R. Co.*, 61 Mo. 528, is of that class. In that class of cases the defect or imperfection is apparent, and, to one experienced in the work or in the implements, the danger is also apparent. In such case, unless the extra hazard is so palpable that no man of ordinary intelligence and prudence would at the risk of his life or limb incur it, the master would be liable to a servant whom he should order to perform the dangerous work, or work not dangerous with implements defective and unsafe.

The first instruction numbered two declares plaintiff's right to recover, if he was in fact ignorant of the existence of the crevice, and of the danger, although it may have been so patent and obvious that a man of ordinary intelligence and observation, in his situation would have seen it. This was error, and should be avoided on the re-trial of the cause. It is unnecessary to notice the alleged errors in the refusal of defendant's application for a continuance and the leave granted to plaintiff to file an amended petition.

The judgment is reversed and the cause remanded. All concur.

CRECELIUS, *Appellant*, v. HORST.

1. **Wills.** In construing a will, the testator's intention governs, and that construction should be given which prevents a failure of the gift.
2. ———. A devise to a class, though as tenants in common, will not lapse by the death of one of the devisees before the testator, but the survivors take the whole.\*

*Appeal from St. Louis Court of Appeals.*

**AFFIRMED.**

*J. A. Beal* for appellant.

*Fred'k Gottschalk* for respondents.

MARTIN, C.—This was a suit in ejectment commenced in St. Louis county, to recover certain interests in real estate in said county. The answer was a general denial. It appears from an agreed statement of facts that one William Crecelius died seized of the land; that he had of his first marriage two children, Catherine Christine and John William, and of his second marriage one child, Ida, who is plaintiff. He died in 1874. He made his will in 1871, whereby he devised to "my daughter Ida, the sum of \$1," to his wife Theresa, who was Ida's mother, "such a share in my estate as the laws of Missouri allow her and no more;" "the residue and remainder to my children John William and Catherine Christine." John William died in 1872 while a member of his father's family and at his house. The court found for the plaintiff and adjudged her entitled to a one-fourth interest, and assessed damages and monthly value. On appeal to the St. Louis court of appeals this judgment was reversed. That court held that the plaintiff was disinherited by the will, and that the portion which

\*These syllabi are taken from the report of the case in 9 Mo. App. 51.

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John William would have taken if he had survived the testator passed to his sister Catherine entirely, and that plaintiff acquired no interest in it. *Creeelius v. Horst*, 9 Mo. App. 51. In our opinion the judgment of the court of appeals was right, and for the reasons given in support of it we affirm its decision. All concur.

HENRY and SHERWOOD, JJ., refused to concur in approving this decision.

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CONDON V. THE MISSOURI PACIFIC RAILWAY COMPANY, *Appellant*.

1. **Negligence: PLEADING.** A petition in an action against a railroad company for personal injuries received in falling from a freight car, stated that the hand-hold on the car "was not safe and sufficient, and by reason of said defectiveness and insufficiency said hand-hold broke." *Held*, that this amounted to an averment that there was a weakness in the fastenings of the hand-hold, in consequence of which it broke, and was a sufficiently specific statement of the negligence intended to be charged.
2. **Instructions.** It is not error to refuse one correct instruction if another to the same purport is given.
3. ——— Where one instruction is given correctly applying a principle to the facts of the case, it is not error to refuse another laying down the principle in a general form.
4. **Fellow-servant.** A car inspector is not a fellow-servant of the brakeman.
5. **Instructions.** It is not error to refuse an instruction which withdraws an issue of fact from the jury when there is evidence bearing upon the issue.
6. **Instructions,** unobjectionable as propositions of law, are properly refused, if there is no evidence of the facts upon which they are predicated.

*Appeal from St. Louis Court of Appeals.*

AFFIRMED.

*Thos. J. Portis* and *H. S. Priest* for appellant.

*George A. Castleman*, *Andrew Mackay, Jr.*, and *A. R. Taylor* for respondent.

HENRY, J.—This suit was instituted in August, 1879, to recover damages for injuries to plaintiff, a servant of defendant, alleged to have been caused by a defective hand-hold on the top of a box car from which plaintiff fell, while in the discharge of his duty as a brakeman at Pacific, a station on defendant's road. The answer contained a general denial, a plea of contributory negligence on plaintiff's part, and also negligence of plaintiff's fellow-servants, and that the car was a foreign car, belonging to another road, and being hauled over defendant's road.

The evidence tended to prove the following facts: The car in question, containing freight, was received by defendant at Kansas City from a connecting road, to be hauled to Cheltenham, a station on defendant's road, near St. Louis. On the day of the accident, the plaintiff with an engineer, fireman and conductor, went from Labadie, a station on defendant's road west of Pacific, with an engine and caboose car to Pacific, under orders to make up there a special train of freight cars, and take it to St. Louis. They arrived at Pacific between six and seven o'clock p. m., when it was so dark as to require the use of lanterns in making up the train. While engaged in switching, plaintiff was ordered by the conductor to get on top of other box cars, attached to the car in question, pass along on the top of said cars and get down from the foreign car by means of a ladder on the side and near the end of said car, placed there to be so used, and pull out a coupling-pin by which said car was attached to a flat car. In obeying said order he slipped and fell, and the hand-hold, to which he held, breaking loose, he was precipitated to the ground, and received the injuries complained of.

The iron bolt by which one end of the hand-hold was



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secured, appeared after defendant's fall to have been freshly broken, but, at the place where the other end of the hand-hold should have been fastened, a hole was found in the plank, partially filled with cinder, and with iron-rust in the hole. The bolt by which that end of the hand-hold was originally secured was missing. Only at terminal stations, such as St. Louis and Kansas City, was it the duty of or custom for car-inspectors to go on top of cars to inspect them unless so requested by trainmen. At intermediate stations it was the duty of inspectors to examine the wheels, axles and running-gear, but not to go on top of the cars to inspect. Where any of the machinery on top of the cars was out of repair, it was the duty of the trainmen to repair it or notify car-repairers of its condition. With respect to the inspection of this particular car, at Kansas City, the evidence that it was made, is entirely circumstantial. The inspector, Byer, in his testimony did not state that he inspected this identical car; did not recollect that he was on duty February 8th, 1879, but supposed he was; did not know that he had let any car pass on the road with hand-hold loose at one end; if he had inspected a car that had a hand-hold in that condition, he would have seen it.

The court, of its own motion, gave the following instructions to the jury:

1. It was the duty of defendant to furnish and supply to its employes or those engaged in running and operating its trains of cars, machinery and appliances, such as cars and the various appliances thereto belonging, that were reasonably safe, secure and sufficient for the transaction of its business, and, in absence of notice to the contrary, the employes of defendant had the right to assume that the cars and appliances furnished to them with which to work were so safe, secure and sufficient. If you find, therefore, that defendant neglected its duty in this behalf, and that on the day specified in the petition William Condon was in the employ of defendant as brakeman, and was at said time engaged in the prudent and careful discharge of his duties

under such employment; and that there was a defective or insufficient hand-hold or appliance upon one of the cars furnished to him, and upon which he was engaged to work at the time, and that by reason or in consequence of such defective or insufficient hand-hold upon the car so furnished him while so engaged in the prudent and careful discharge of his duty, and without any knowledge thereof upon his own part, said Condon fell or was thrown from said car, and was run over and injured by a car or train of cars then being run and operated by defendant, then the verdict of the jury must be for plaintiff.

Although the jury may believe from the evidence that the car in question was a foreign car, (that is a car belonging to some other railroad company,) and that it had been received by defendant from such other company for purposes of transportation, and that when so received the hand-hold thereon was defective, yet, if the jury believe that such defect was known to defendant at and prior to the accident, or that by the exercise of ordinary care and diligence, it might have been known and repaired, defendant is not excused by the fact that it was a foreign car and was in a defective condition when received. Nor is defendant excused by the fact that it had no actual knowledge of any defect in the car, if, by the exercise of ordinary care and diligence, it might have known of such defect prior to the accident.

2. If defendant kept car-inspectors or repairers at Kansas City, St. Louis and other intermediate points, who were charged by defendant with the special duty of examining into the condition of cars at those points and seeing that they were in running order and in safe and proper condition to be used before they were suffered to depart therefrom, then defendant is liable to plaintiff for any neglect of duty on the part of such inspectors and repairers whereby plaintiff was injured, if the jury believe he was so injured in consequence of any such neglect of duty.

3. If the jury find for plaintiff, they will assess his

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damages at any sum, not exceeding \$20,000, which the testimony warrants, and, in determining the amount, the jury are at liberty to take into consideration all the injuries sustained at said time by plaintiff, with the personal pain and suffering and consequences resulting therefrom, whether temporary or permanent, bearing in mind always that it is compensation only which is to be fixed by them for the damage to plaintiff by reason of the negligence of defendant.

4. The mere fact that the injury resulted to plaintiff from a defect in the hand-hold, is not of itself sufficient to entitle him to recover, but the burden is upon plaintiff to show that defendant had notice of the defect, or that, by the exercise of proper care, it might have known of it, and also to show that the accident happened from or by reason of the defect complained of in the petition.

5. If the jury believe from the evidence that the car from which the plaintiff fell and was injured was a foreign car, that is, a car which belonged to another railroad, and was received by defendant in the usual course of business, to be by it transported over its railroad, and that said car was not one of defendant's own cars, then to entitle plaintiff to recover, the evidence must also show that the defect complained of in the hand-hold of said car existed at the time said car was so received by defendant on its railroad, and that defendant knew, or by the exercise of proper care and caution might have known, that fact; or, the evidence must show that such defect arose after the said car was so received by defendant on its road by or from some negligence or fault of defendant; or that it arose, after the car was so received, without defendant's fault, but that defendant knew, or by the exercise of ordinary care and diligence might have known, of the defect and repaired it, or given plaintiff warning thereof prior to the accident.

At defendant's instance, the court instructed the jury that if they believed from the evidence "that the injuries complained of were brought upon himself, in whole or in

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part, by his own carelessness, negligence, recklessness or want of proper care and caution, directly contributing thereto, then he is not entitled to recover." Many other instructions, asked by defendant and refused, will be noticed hereafter. There was a judgment for \$5,000, from which an appeal was taken to the St. Louis court of appeals, in which it was affirmed *pro forma*, and defendant has appealed to this court.

It is objected to the petition that "it states conclusions and not facts." I confess an inability to comprehend the meaning of counsel, in this objection. The petition states the position of the company toward employes—the duty of plaintiff as brakeman, and then proceeds to state the facts, showing the manner in which he fell and was injured. No conclusions of law are pleaded, and if there were, sufficient facts are alleged to constitute a cause of action.

It is contended that it is defective in not stating specifically, wherein the hand-hold was defective. It alleges  
1. NEGLIGENCE: "that it was not safe and sufficient, and by pleading. reason of said defectiveness and insufficiency, said hand-hold broke," etc. This is wholly unlike the petition in the cases of *Waldhier v. R. R. Co.*, 71 Mo. 516; *Harrison v. R. R. Co.*, 74 Mo. 369, cited by counsel. The allegation in this petition is, substantially, that there was a weakness in the fastenings of the hand-hold in consequence of which it broke. Defendant was apprised by this petition of the precise negligence for which it was sued, and the allegation was sufficiently explicit.

The instructions given by the court of its own motion very fully and fairly declared the law applicable to the facts  
2. INSTRUCTIONS. which the evidence on either side tended to prove. *Porter v. H. & St. Jo. R. R. Co.*, 71 Mo. 66. The first of defendant's refused instructions declares that "the mere fact that the injuries to plaintiff resulted from the defect of the hand-hold, is not sufficient to entitle him to recover." That is correct, but the court, in the second, sixth and seventh instructions given of its own motion, ex-

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plicitly declared that the mere fact that the injury resulted to plaintiff from a defect in the hand-hold, was not of itself sufficient to entitle him to recover, but the burden is upon the plaintiff to show that defendant had notice of the defect, or that by the exercise of ordinary care and diligence, it might have known it.

The second of defendant's refused instructions declares that the car in question being a foreign car, defendant is

3. —. not held to such strict liability for defective

construction as it would be with respect to one of its own cars, but is only liable for such defects as are so patent and obvious that they may be discovered by the exercise of ordinary care and caution. That is the extent of defendant's liability declared by the court in the instructions given. It is not declared in the court's instructions that the defendant is held to a less strict liability in case of foreign cars, but that declaration amounts to nothing, unless the extent and nature of the liability is declared, and when declared the general declaration might be stricken from the instruction, without at all weakening its force.

The third refused declared that car-inspectors at the intermediate stations, were fellow-servants of plaintiff, and

4. FELLOW-SERVANT. that if the proximate cause of plaintiff's injury was attributable to any want of care or caution on their part, defendant was not liable. Car-inspectors are not co-employees with trainmen. *Long v. Pacific Ry Co.*, 65 Mo. 225.

The fourth, fifth, sixth, seventh, thirteenth and fourteenth refused instructions are disposed of by what has been said

5. INSTRUCTIONS. of those preceding them, and the fourth, fifth and tenth are vicious for the additional reason, that they withdraw from the jury the question whether the car was defective as alleged, when received by defendant, and whether the defect, if it existed when so received, might have been known by defendant, if proper care and caution had been exercised by it. These instructions declare that there was no evidence tending to show either of these facts.

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The eighth refused declared that for injuries received by a servant through the negligence, etc., of a fellow-servant, the master is not liable. No objection is perceived to that instruction as a proposition of law, but there was no evidence whatever tending to prove such a case; and the same is true of the ninth, which declares that the conductor and men in charge of the train are fellow-servants, and that if plaintiff's injury was caused by the negligence, etc., of the conductor, the company was not liable.

The eleventh refused was to the effect that defendant was not liable for an injury to plaintiff from a cause open to his observation, and that if the evidence showed that his opportunities of observing and knowing the condition of the hand-hold, were equal to or superior to those of defendant, he could not recover. This was correct as an abstract proposition of law, but the evidence clearly proved that plaintiff, for the first time, went upon the car in question in discharge of duty as a brakeman after dark, and there was no evidence showing that he had ever seen it before, while the proof was that at Kansas City defendant had ample time and opportunity to inspect it thoroughly, and should have done so.

The thirteenth was but a repetition of the sixth given by the court, and was, therefore, properly refused, and the substance of the fourteenth was contained in the seventh given by the court of its own motion.

It is insisted by defendant's counsel that defendant is not liable, because it was the duty of the conductor and brakeman to inspect the car, and report defects or repair them. It was not proved that such is their duty. That it is their duty, if they know of any defect, to report it to the car-repairer or repair it themselves, was shown, but they are not required to inspect the cars, and may assume that the inspectors have performed their duty, and that the car is all right. It is not pretended that the conductor, or other fellow-servants of the plaintiff, knew of the defect com-



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plained of, and the evidence conclusively shows that neither of his fellow-servants saw the car before they reached Pacific, nor does it appear that either of them was ever on top of the car in question, before the plaintiff was injured.

Many other questions are raised by appellant's counsel in their brief and argument, which have not been overlooked, but the length which this opinion has already reached forbids particular notice of them all. After a careful examination of the record, and points made, and authorities cited, we are satisfied that this cause was tried with exceptional fairness, and that no material error was committed by the circuit court in the progress of the trial. The judgment is affirmed. All concur.

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THE STATE *ex rel.* CLINTON COUNTY V. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, *Appellant*.

**Re-taxation of Costs.** The court may, upon notice, correct an error in the taxation of costs after the lapse of the judgment term and after the judgment and costs as first taxed have been paid.

*Appeal from Chariton Circuit Court.*—HON. GEO. W. DUNN, Judge.

AFFIRMED.

*Geo. W. Easley* for appellant.

*J. M. Lowe* and *R. Hughes* for respondent.

MARTIN, C.—The controversy in this case is about costs, and rises from a motion to re-tax costs in favor of the plaintiff's attorney, which was filed on the 26th day of April, 1879. It appears from the record that at the December term, 1876, of the Clinton circuit court, the plaintiff in a

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suit bearing the name and style of the parties to this record, recovered judgment against the defendant in the sum of \$6,390, for back taxes due from defendant for the years 1873 and 1874, and for costs of suit. By the session acts of 1875 it is provided that the "prosecuting attorney instituting and conducting such suit for the taxes, shall, if the plaintiff's recover judgment, receive as his full compensation for his services therein a sum equivalent to five per cent of the sum recovered of said defendant, which said attorney's fees are to be taxed as costs in said cause and recovered and collected as other costs." Sess. Acts 1875, p. 127. The suit in which the judgment was recovered was instituted at the April term, 1875, by J. M. Lowe, Esq., as prosecuting attorney, and was concluded by Roland Hughes, who had succeeded him in such office. In the taxation of costs the clerk failed to include the sum of \$319.50, which under the law should have been taxed in favor of the attorneys of plaintiff. On the 16th day of June, 1877, the defendant satisfied the judgment in the case and all the costs at that time taxed by the clerk, and received an acquittance or discharge to that effect. Afterward, in April, 1879, the attorneys of plaintiff filed in the case this motion to have the costs re-taxed so as to include the fees given them by the statute. A summons was attached to this motion as if it was a petition and the same was served on the defendant, who without objection appeared in court, made answer in writing to the merits of the motion and joined with the plaintiff in an agreed statement of facts upon which the court acted as in an independent proceeding. On the law and agreed case the court, after waiver of jury, rendered a formal finding of the facts as herein recited, and thereupon entered an order on the clerk to re-tax the costs in the case by including the sum of \$319.50 in favor of said attorneys, and awarded execution therefor. The defendant took exception to this action of the court claiming that it had no jurisdiction to enter the order so long after the judgment had been rendered, and after it had been satisfied.

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The only question for us to decide is whether the order of re-taxation could be made at the time it was entered after lapse of the term and payment of the judgment. Under the ancient common law costs were not recoverable, and the right to them depends upon statute. *Steele v. Wear*, 54 Mo. 531. This right was first given by the statute of Gloucester, (6 Edw. 1, ch. 1,) which has been very generally adopted in this country. In our statute on costs it is provided that "in all civil actions the prevailing party shall recover costs, except in those cases in which a different provision is made by law." R. S. 1879, § 990. This statute leaves the adjudication of costs in many cases to the discretion of the court. If the case does not fall within that discretion the costs must be taxed against the losing party. *DuPont v. McLaran*, 61 Mo. 502. It is further provided in our statute that "any person aggrieved by the taxation of a bill of costs may upon application have the same re-taxed by the court in which the action or proceeding was had, and in such taxation all errors shall be corrected by the court." R. S. 1879, § 1011. The duty of taxing costs is in the first instance imposed on the clerk of the court, who shall tax them "agreeably to fees which shall for the time being be allowed by law." R. S. 1879, § 1010. When the judgment in this case was rendered we have seen that the law allowed the fee in controversy, and provided that it should be taxed and recovered as other costs in the case. It was, therefore, the duty of the clerk to tax the fee as claimed, and his omission to do so was not cured by lapse of time or payment of the judgment and costs as taxed. The fact that everything else which was taxed by the clerk has been paid, does not change the obligation of the defendant to pay the fee now claimed, and which should have been taxed at the time of the judgment. An application upon notice in the original action is the proper method of making the correction. A distinct and independent suit to effect this purpose would not lie. *McGindley v. Newton*, 75. Mo. 115.

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It is our judgment that the action of the court in making the order of re-taxation, which has been appealed from, ought to be affirmed, and it is so ordered. All concur.

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TURNER V. THE KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS  
RAILROAD COMPANY, *Appellant*.

1. **Practice:** AMENDMENT: JUSTICE'S COURT. The circuit court, on appeal from a justice, may allow the constable to amend his return on the summons, according to the fact, so as to show proper service on the defendant.
2. **Railroads:** SIGNALS. Section 38 of the Railroad Law, (Wag. Stat., p. 310,) does not require both the ringing of the bell and the sounding of the whistle when a train approaches a public crossing. Either will suffice.
3. — : STOCK RUNNING AT LARGE: CONTRIBUTORY NEGLIGENCE. It is no defense to an action under section 38 for killing stock, that the plaintiff allowed his animals to run at large upon the highway near the railroad.
4. — : FAILURE TO GIVE SIGNALS. If the company fails to give the signal required by section 38, and stock is killed or injured, which is in such a condition or situation that if the signal had been given it might have escaped, this constitutes a *prima facie* case against the company.

*Appeal from Platte Circuit Court.*—HON. GEO. W. DUNN,  
Judge.

REVERSED.

*Strong & Mosman* for appellant.

*R. P. C. Wilson* for respondent.

HENRY, J.—This suit originated in a justice's court in Platte county, and is for damages for killing plaintiff's stock by a train of cars passing over defendant's road, in consequence, it is alleged, of a failure to ring the bell or sound

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the whistle, in violation of section 38, article 2, Wagner's Statutes, volume 1, page 310.

On a motion in the circuit court to which the cause was appealed, to quash the return of the constable on the writ of summons, and dismiss the suit, the court allowed that officer to amend his return, and overruled the motion. The constable's original return was imperfect and defective, but might have been amended in the justice's court, and we think that when the circuit court became possessed of the cause it also could allow the amendment. The justice had jurisdiction of the cause, if the writ was in fact properly served upon defendant, whether the return of service made by the officer was defective or not. The service in this case was sufficient, and the return only was defective in not stating correctly the manner of service, and no error was committed by the circuit court in permitting the amendment.

The evidence proved the killing of the stock by defendant's train of cars, but whether the bell was rung or the whistle was sounded as required by the statute, was not so clear from the evidence. The court, for plaintiff, gave to the jury the following instruction:

If the jury believe the horses and colt in question were injured and killed in the public road or highway where the defendant's track crosses it in Lee township, Platte county, Missouri, on or about the 6th day of July, 1879, by the locomotive and cars of the defendant, and that defendant failed to sound a whistle on said locomotive eighty rods from the crossing of said public highway and continue to sound the same at intervals until said highway was passed by the train, or failed to ring a bell within said eighty rods and continue ringing the same until the railroad train crossed said road or highway, they will find for the plaintiff; provided, they further believe that the failure as aforesaid to sound the whistle and ring the bell caused the injury complained of.

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The instruction is manifestly erroneous. The statute does not require both the blowing of the whistle and ringing of the bell. Either is sufficient, and yet the instruction is predicated upon a supposed legal duty to do both. By it the jury were told that if defendant failed to blow the whistle, or failed to ring the bell, and if the injury to the stock was caused by such failure to sound the whistle and ring the bell, plaintiff was entitled to recover. The instruction should have been to the effect that if defendant neither sounded the whistle, nor rang the bell, etc., and if the injury was occasioned by such neglect, plaintiff was entitled to a verdict. *Van Note v. Hannibal & St. Joseph R. R. Co.*, 70 Mo. 641.

Counsel for appellant contend that the 38th section imposes no duty upon defendant to plaintiff as to stock which he allowed to stray upon the highway in the vicinity of the track. It is well settled in this State that the owner of cattle is guilty of no negligence in permitting his stock to run at large, whether in the vicinity of a railroad track or remote from one; and the statute was passed in order to require the railroad companies to use proper precautions to avoid injuring or killing stock which might be on or near railroad crossings of public roads. In its wisdom the legislature determined that ringing the locomotive bell, or sounding the whistle, would tend to prevent the injury of stock at such crossings.

Counsel argue from the evidence of experts that neither ringing the bell nor sounding the whistle is apt to frighten stock from the track, but that on the contrary, if near the track, they are as likely to run upon the track of the road as away from it, when frightened by whistle or bell. This may be, but it is a matter for the consideration of the legislature. Section 38 may be an unwise provision, so far as applicable to stock, but this court is not, therefore, authorized to eliminate it from the statutes. The duty imposed by section 38 is not

3. —: stock running at large: contributory negligence.

4. —: failure to give signals.



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a very onerous one, and if by complying with that section cattle near the track are frightened and run on the track, or cattle on the track are not frightened off, and are injured, the company incurs no liability under that section, and, therefore, the better course—the only safe course for the company, is to observe the requirements of the statute. When the stock killed or injured at a crossing are in a condition and situation to escape, if the required signal is given, a *prima facie* case is made against the company, if it has failed to give such signal. This has been repeatedly held by this court, and recently in two cases. *Goodwin v. R. R. Co.*, 75 Mo. 75; *Alexander v. R. R. Co.*, 76 Mo. 494.

For the error contained in the plaintiff's instruction, the judgment is reversed and the cause remanded. All concur.

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HORNBLOWER V. CRANDALL *et al.*, Appellants.

1. **Informal Record.** Where the record entries sufficiently show that the judgment is made to follow a confirmation of the referee's report, that there was an informality in making up the record, which could work no injury to the appellant, is not a ground for reversing the judgment.
2. **Referee's Finding: WEIGHT OF EVIDENCE.** An objection that the finding of a referee is against the weight of evidence can be raised only in the trial court, and is properly raised there only by specifying the particular findings objected to and the distinct grounds of objection.
3. **Corporate Undertaking: LIABILITY OF ASSOCIATES FOR FRAUDULENT MANAGEMENT.** Where several persons engage in business jointly, and, to facilitate such business use a corporate name and issue stock, and, in the promotion of the scheme, false representations are made by those holding themselves out as promoters and managers of the business as to the material facts of inducement and as to matters peculiarly within the knowledge of all the associates or their agents, all those engaged in the promotion of the business as associates of those making the false representations are liable to those

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who, relying upon such representations, purchase stock to their hurt.

4. ——— : ——— : INNOCENCE NO PROTECTION, WHEN. That one of the associates thus connected is ignorant of the details of the business, will not avail him where he had the means of knowing but trusted to his associates, and where he, with the others, received the benefits of the wrong-doing.
5. **Practice.** While the trial issues must be within the paper issues, they may be less.\*

*Appeal from St. Louis Court of Appeals.*

**AFFIRMED.**

*T. C. Fletcher, R. F. Wingate, J. O. Broadhead and J. B. Bowmay* for appellants.

*Glover & Shepley and Edmund T. Allen* for respondent.

RAY, J.—This cause originated in the St. Louis circuit court, where there was a dismissal as to defendant Minshall, and a judgment for plaintiff against the other defendants, from which defendants Conlogue and McKeen appealed to the St. Louis court of appeals, where the judgment of the circuit court was affirmed, from which Conlogue and McKeen have appealed to this court. The case is reported in 7 Mo. App. 220, *et seq.*, where the opinion of the court of appeals is published in full, to which a reference is here had. After a careful examination of that opinion, the briefs of counsel and citation of authorities, we are satisfied that the St. Louis court of appeals made the proper disposition of the case, and for the right reasons. We have also duly considered the able and elaborate briefs of counsel in this court, but find no sufficient reason to depart from the conclusions reached by the court of appeals or to add anything to the views there so well expressed.

For these reasons the judgment of the St. Louis court of appeals is affirmed. All concur.

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\*These syllabi are taken from 7 Mo. App. 220.

WATSON V. CRANDALL *et al.*, Appellants.

**Liability for false Representations.** A is responsible for the consequences of false representations made by him to B, and upon which C acted to his loss, where it appears that A intended that they should be communicated to C, and acted upon by him in the manner which occasioned the loss.\*

*Appeal from St. Louis Court of Appeals.*

**AFFIRMED.**

*T. C. Fletcher, R. F. Wingate, J. B. Bowman and James O. Broadhead* for appellants.

*Glover & Shepley and Edmund T. Allen* for respondent.

RAY, J.—This cause was commenced in the St. Louis circuit court, where there was a dismissal as to defendant Minshall, and a judgment for the plaintiff against the other defendants, from which Conlogue and McKeen appealed to the St. Louis court of appeals, where the judgment of the circuit court was affirmed, from which the said Conlogue and McKeen have appealed to this court. The case is reported in 7 Mo. App. 233, where the opinion of that court is set out in full, and to which reference is here had. Upon a careful consideration and review of that opinion we are satisfied with the result reached by that court, and for the reasons assigned. After a careful examination, also, of the elaborate briefs of counsel, in this court, we find no cause to change our views. We think the case well considered and properly decided.

For these reasons the judgment of the St. Louis court of appeals is affirmed. All concur.

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\*This syllabus is taken from 7 Mo. App. 233.

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BAKER'S ADM'R V. CRANDALL *et al.*, Appellants.

1. **Watson v. Crandall**, *ante*, p. 583, followed and affirmed.
2. **The Common Law**: ANCIENT ENGLISH STATUTES. Independent of statutory enactment, it is the established doctrine that English statutes passed before the emigration of our ancestors applicable to our situation, and in amendment of the law, constitute a part of the common law of this country.
3. **Action for Deceit**: SURVIVAL. The right to maintain an action for deceit survives to the legal representatives of the party injured. This is true both under our statute, (R. S. 1879, § 96,) and at common law as modified by the statutes of 4 Edw. III, c. 7, and 31 Edw. III, c. 11.
4. **Death of Party**: REVIVAL OF ACTION: WAIVER. A party died during the pendency of a cause. His death was suggested, and without a formal order of revival his administrator appeared and the cause proceeded in the name of the administrator. The adverse party participated in the proceedings and never objected to the want of such an order till the cause reached this court. *Held*, that the objection then came too late.

*Appeal from St. Louis Court of Appeals.*

AFFIRMED.

*T. C. Fletcher, R. F. Wingate, J. B. Bowman and James O. Broadhead* for appellants.

*Glover & Shepley and Edmund T. Allen* for respondent.

RAY, J.—This cause originated in the St. Louis circuit court, where there was a dismissal as to defendant Minshall, and a judgment in favor of the plaintiff against the other defendants, from which the defendants Conlogue and McKeen appealed to the St. Louis court of appeals, where the judgment of the circuit court was affirmed, from which Conlogue and McKeen have appealed to this court. The opinion of the court of appeals affirming the judgment of the circuit court, appears by the record, and is in the following language, to-wit: "The facts in the present case

are, in all essential particulars, similar to those in the case of *Watson v. Crandall et al.*, No. 1221, decided at the present term, and for the reasons given in the opinion in that case, the judgment of the court below is affirmed. All the judges concur." The opinion in the case of *Watson v. Crandall*, above referred to, is set out in the record, and is also reported in 7 Mo. App. 233, to which reference is here had.

In addition to the points and authorities, considered and disposed by the court of appeals, in their said opinion, in which after careful examination we concur, certain other questions have been presented, in this court, which it is deemed proper to notice.

It is contended for the appellants, 1st, That the cause of action, being *ex delicto*, did not survive to the administrator of the original plaintiff; 2nd, That if it did, there was no order of court reviving the same, and no appearance thereto, of the adverse party, after the suggestion of the death of Baker, and the appearance of his administrator. On the other hand, it is insisted by respondent that the cause of action did survive to said administrator—that the same was revived in his name, and that the defendants appeared thereto, and made no objection to said survival or revival, or the want thereof; and further, that if they did, they failed to specify or renew said objection in their motion for a new trial, and thereby waived the same, and will not now be heard to complain.

On the first point our statute would seem to be conclusive against the position of the appellants. Section 96, Revised Statutes 1879, provides that: "For all wrongs done to the property, rights or interest of another, for which an action might be maintained against the wrong-doer, such action may be brought by the party injured, or after his death, by his executor or administrator, against such wrong-doer, and after his death, against his executor or administrator, in the same manner and with the like effect in all respects as actions founded on contracts." Section 97, same statute, declares that: "The preceding section

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shall not extend to actions for slander, libel, assault and battery, or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff or to the person of the testator or intestate of any executor or administrator."

It is conceded by appellants, that if the question is determinable by our statute, the cause of action survived to the administrator. But it is contended that Baker, the original plaintiff, purchased the stock in question, in Boston, Massachusetts, being induced thereto by misrepresentations there made to him—and that the cause of action, if any, arising out of said transaction, originated in that state, and is, therefore, governable and determinable by its laws, as the *lex loci*, and not by the laws of this State or the *lex fori*. It is also insisted, that in the absence of proof to the contrary, our courts will presume that the common law was in force in the state of Massachusetts, and that, by that law the right to maintain an action *ex delicto* or to recover damages for a deceit dies with the party injured; and that consequently, no such action can be maintained in the name of the administrator, in the courts of this State, whatever may be our laws in that behalf. If it should be conceded, as claimed by appellants, that the cause of action originated in the state of Massachusetts, and is governable and determinable by its laws, and that the common law was in force in that state, the question still remains, what is held to be and constitute the common law of this country, and what rule, if any, does that law, as thus defined and recognized, furnish in regard to the survival of causes of action, like the one at bar.

Chancellor Kent, who is justly esteemed by the American bar and bench good authority on this subject, speaking

2. THE COMMON LAW: of the sources of the common law, lays  
ancient English statutes.

down the doctrine thus: "It is also the established doctrine, that English statutes, passed before the emigration of our ancestors, and applicable to our situation, and in amendment of the law, constitute a part of the



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common law of this country." 1 Kent Com., 473. To the same effect also are the following authorities: *Patterson v. Winn*, 5 Pet. 233, 241; *Sackett v. Sackett*, 8 Pick. 309, 314, 315; *Bogardus v. Trinity Church*, 4 Paige 198, 199; *Girard v. Philadelphia*, 4 Rawle 333.

Bliss on Code Pleading treating of "what rights of action arising from torts survive under the statute of 3 Edward III," uses this language: "At common law, in the case of injuries to personal property, if either party died, in general no action could be supported, either by or against the personal representatives of the parties, when the action must have been in form *ex delicto*, and the plea, not guilty. But the statute of 3 Edward III, chapter 8, having always been in force in this country, may so far, and the decisions under it, be treated as a part of the common law. They certainly embody the general law upon the subject when not changed by our statute, and according to them every kind of injury to personal property by which it has been rendered less beneficial to the estate gives a right of action, which survives to the personal representative, leaving the right which springs from personal injuries to die with the party." § 39. In harmony with this doctrine also is the statute law of this State, on the same subject. Section 3117, Revision 1879, provides that: "The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, and which are of a general nature, not local to that kingdom, which common law and statutes are not repugnant to or inconsistent with the constitution of the United States, the constitution of this State and the statute laws in force for the time being, shall be the rule of action and decision in this State, any law, custom or usage to the contrary notwithstanding." Accepting these authorities, as a fair exponent of what, in this country, constitutes the common law, it only remains to inquire whether, by that law, as thus defined and recog-

3. ACTION FOR DE-  
CEIT: SURVIVAL.

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nized, this cause of action survived to the administrator in question.

It may be conceded that by the old common law prior to 4 Edward III, c. 7, and 31 Edward III, c. 11—the general rule in cases of torts and in actions *ex delicto*, was that upon the death of either party, the right of action did not survive to or against the personal representative of either. But by these statutes which were passed long before the emigration of our ancestors, and which, under the authorities above cited, constitute a part of the common law, this rule was altered in its relations to personal property and in favor of the personal representative of the party injured. The extent and effect of that alteration, as gathered from a careful examination of the numerous authorities, may, we think, without going into particulars, be briefly stated thus: Under the operation of these statutes, and the adjudications thereunder, it was held that the cause of action for any wrong to personal property, by which it was rendered less beneficial to the injured party, survived to his personal representative. It was also held that wrongs contemplated by these statutes were not limited to injuries to specific articles of personal property, but extended to other wrongs by which his personal estate was injured or diminished in value, etc. 1 Chitty on Plead., (16 Am. Ed.) 77, 78; Bliss on Code Plead., § 39; Pomeroy on Remedies, § 147, note 1; 2 Addison on Torts, 537, 538, note 1; *Whealey v. Lane*, 1 Sand. 217; *Bixbie v. Wood*, 24 N. Y. 607, 611, 612; *Bayard v. Homes*, 23 N. J. L. 119; *Hambley v. Trott*, Cowp. 375; *Higgins v. Breen*, 9 Mo. 494, 495.

The cases of *Zabriskie v. Smith*, 3 Ker. 322; *Read v. Hatch*, 19 Pick. 47; *Henshaw v. Miller*, 17 How. 212, cited by appellants, and perhaps some others in some particulars may seem somewhat to militate against this position, but a decided weight of authority supports it. Under the old system of pleading, also, where there were different forms of action, it was held that while certain actions survived or died on account of the cause of action, certain others

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died or survived on account of the form of the action. *Hambley v. Trott*, 1 Cowp. 212; 2 Addison, 537, 538, note 1. Under our system of pleading, however, no such result can follow. With us there is but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, and consequently actions can only survive or die by reason of the cause of action itself, and, therefore, many of the old adjudications on this point are no longer of value.

In this connection we may further add that in *Higgins v. Breen*, 9 Mo. 494, 495, this court, in treating of the scope and effect of the English statute of 4 Edward III, above cited, and of the wrongs and injuries embraced therein, and covered thereby, and of the changes made therein by our statute, used this language: "The statute, (referring to the English statute above cited,) it will be perceived, only gave actions to executors and not against them, for as against the person committing the injury the action died with him. Chitty, 59; 1 Sanders 217. Our statute has changed the English law in this respect, and has given an action both to and against executors, and by employing much broader language than the statute of Edward, seems to have included, by express enactment, the injuries which were comprehended in that statute only by construction. The words of our statute are: 'for wrongs done to the property, rights or interest of another,' etc., with an exception of actions for slander, libel, assault and battery, or false imprisonment, and to action on the case for injuries to the person." 9 Mo. 495. It is conceded, as hereinbefore stated, that if the question is determinable by our statute, this cause of action survives to this administrator. So far as the personal representative of the injured party is concerned, (as appears by the above quotation from 9 Mo. 494,) this court has construed the English statute in question to comprehend by construction, the injuries which by express enactment are included in our statute.

It follows, therefore, from this as well as from the other

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authorities hereinbefore cited, that this action survives to this administrator, by the common law as above defined and recognized. It also follows that there is in this case no conflict between the *lex loci* and the *lex fori*, and consequently, we are relieved from the necessity of considering or determining the perplexing questions growing out of and incident to such conflicts. The action survives whether determinable by our statute or the common law.

As to the second point, the record shows that the original judgment in this cause was rendered on the 8th day of

**1. DEATH OF PARTY:** April, 1878; that the usual motions for revival of action: **waiver.** new trial and in arrest, were filed, taken up, overruled and excepted to, etc.; that afterward, on the 12th day of May, 1878, the death of Edward L. Baker, the original plaintiff, was suggested and admitted, and on the same day M. D. Lewis entered his appearance herein as administrator of Baker, the original plaintiff, and thereupon, on motion of plaintiff's attorney, the judgment aforesaid hereinbefore rendered, was by the court set aside, it appearing that the original plaintiff had died on the 6th day of April, 1878, before the entry of the original judgment, but since the overruling of the exceptions to report of referee. Thereupon, on motion of plaintiff and notwithstanding the objections of the defendant, the court proceeded to enter judgment on the report of the referee, as follows: "Martrom D. Lewis, administrator with the will annexed of Edward L. Baker, deceased, against Eli J. Crandall, John W. Conlogue, Jeremiah D. Slocum, Amen V. Bohn and William R. McKeen. Now at this day come said parties, by their respective attorneys, and thereupon this cause is submitted to the court, upon the report of the referee, etc., etc., \* \* (omitting formal points of finding, judgment, etc., of the court). To which opinion and decision of the court, in rendering said judgment, the defendants excepted at the time."

Thereupon (within four days) defendants filed their motion for new trial and in arrest, which is like the former

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motions, except the following is added to the motion for a new trial: "1st, Because the court erred in entering said judgment, after setting aside the former judgment herein, and against the objections of defendants took the cause as submitted on the report of the referee and objections thereto, as heretofore filed, and in refusing a new trial after setting aside said judgment." "19th, The questions submitted to the referee are not material, and do not embrace the issues made by the pleadings, and the findings on them do not authorize the plaintiff to recover." With such a record before us, how can it be held that said action was not revived in the name of said administrator, or that defendants did not make their voluntary appearance to the same? True, the record does not show, in direct and express terms, a formal order reviving said action; but it clearly appears, we think, that the action was treated as revived in the name of the administrator, not only by the court but by both plaintiff and defendants. The court, after the suggestion of the death of Baker, and the entry of the appearance of Lewis as his administrator, on motion of plaintiff's attorney and without objection, set aside the original judgment, and thereupon, on like motion of plaintiff's attorney, and notwithstanding the objections of defendants, rendered a judgment in favor of said administrator, and against said defendants, on the report of the referee and the objections thereto, as theretofore filed in said cause. To which action of the court the defendants excepted, and afterward further appeared and filed new motions for new trial and in arrest, in neither of which is the point made that said cause of action did not survive to said administrator; or that said action in point of fact, was not revived in the name of said administrator; nor yet that there was no appearance of the defendants to said cause of action, after the suggestion of the death of Baker, the entry of the appearance of his administrator, and subsequent proceedings therein. Even if it be conceded error to have proceeded with the cause, without a formal order reviving, in express terms, said ac-



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tion, in the name of the administrator, or without a like formal entry of the voluntary appearance of the adverse party; yet if it clearly appears from the whole record, as we think it does in this case, that the adverse party did in fact appear in the cause and take part in the proceedings, object to the same and save his exceptions thereto; yet if he fails in his motion for a new trial, to call the attention of the court to the alleged error, such as the want of a formal revival of said suit, or the non-appearance of the adverse party to said action, he will not be heard afterward to raise the point. In this case the record fails to show that any such objections were made, in the progress of the cause; or if so made it clearly appears that they were not renewed in the motion for a new trial in the circuit court; nor does it appear that any such objections were raised in the court of appeals, where the cause was fully argued and decided. Under such circumstances will or ought the parties, to be heard to make the point for the first time, in this court? The adjudications of this court are to the contrary. *Carver v. Thornhill*, 53 Mo. 283; *Lohart v. Buchanan*, 50 Mo. 201; *Bauer v. Franklin Co.*, 51 Mo. 205; *Hirt v. Hahn*, 61 Mo. 496.

The case of *Harkness v. Austin*, 36 Mo. 47, in its facts and circumstances, is wholly unlike this. There the appellant did not appear at all, for any purpose, at the term of court at which the death of the original plaintiff was suggested and at which the suit was revived and judgment was rendered in the name of the administrator. At a subsequent term of the court, however, and within the three years allowed by the statute in such cases, he did appear and move the court to set aside said judgment against him for irregularity, etc., as he had a right to do. There was no pretense that he had made any appearance or taken any part in the proceedings, at the term at which the proceedings were had, of which he complained. Not so here. A careful examination of the briefs and authorities cited, will,



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we think, furnish no sufficient reason to depart from the views hereinbefore expressed.

For these reasons, in addition to those set out by the court of appeals, in their opinions above referred to, the judgment of said court of appeals is affirmed. All the judges concur.

In the case of *Reed's Adm'r v. Crandall*, submitted at the same time and involving a similar state of facts, the judgment was affirmed for the same reasons as in the foregoing case, RAY, J., delivering the opinion of the court.

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WHITING'S ADM'R V. CRANDALL *et al.*, Appellants.

**Hornblower v. Crandall**, *ante*, p. 581; *Watson v. Crandall*, *ante*, p. 583, and *Baker's Adm'r v. Crandall*, *ante*, p. 584, followed and affirmed.

*Appeal from St. Louis Court of Appeals.*

AFFIRMED.

*T. C. Fletcher, R. F. Wingate, J. B. Bowman and James O. Broadhead* for appellants.

*Glover & Shepley and Edmund T. Allen* for respondent.

RAY, J.—This cause was commenced in the St. Louis circuit court, in the name of Thomas E. Whiting, the original plaintiff. During the progress of the cause the death of Whiting was suggested, the appearance of Martrom D. Lewis, as his administrator, was entered, and, thereafter, upon the appearance and submission of the parties, there was a judgment in favor of the plaintiff against the defendants, from which the defendants Conlogue and McKeen, after motions for new trial and arrest, appealed to the St. Louis court of appeals, where the judgment of the circuit

court was affirmed, from which Conlogue and McKeen have appealed to this court. The opinion of the court of appeals, affirming the judgment of the circuit court appears of record, and speaking of the original plaintiff Whiting, is in the language following, to-wit:

"According to the finding of the referee, the plaintiff in the present cause, in purchasing stock in the Pioneer M. & S. Company, relied upon false representations made by Crandall to a son of Hornblower, the plaintiff in the case of *Hornblower v. Crandall*, as well as upon representations made by Crandall to the elder Hornblower. Through the medium of young Hornblower, the plaintiff Whiting is as directly connected with Crandall and his associates, as are Watson, Reed and Baker in their respective cases, Crandall having in the fall of 1871 sent young Hornblower to Boston to dispose of some of the stock. One hundred shares were thus disposed of to Whiting at \$44 a share, the certificates being sent to him and with them a draft drawn to the order of Minshall by Crandall, the proceeds of which, it may be fairly inferred, went into the common fund. All these representations, both those exhibited to the plaintiff through the letters and papers of Crandall, sent to the elder Hornblower as well as young Hornblower's statements, as the referee finds, were made by the defendant Crandall, with the intent that they should be communicated to any person, who by them might be induced to purchase the stock. Among other statements made to the elder Hornblower and communicated to the plaintiff, was one to the effect that the operations of the company in mining, smelting and selling lead, from May 1st, 1871, to December 1st, 1871, had resulted in a net gain or profit of \$13,988.50; whereas, as the referee finds, the operations of the company during the period named had not resulted in any profit, but in a loss of \$6,387.09. Among false representations, known by Crandall to be such, and made with intent through young Hornblower to deceive, was the statement, communicated through young Hornblower to the plaintiff Whiting, that

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for 600 acres of land which the company had bought, it had paid \$10,000 in cash from the earnings of the company, which had been made since it had been running; the fact being that it had not earned any cash profit, but had steadily lost money since it had begun its operations. There is, therefore, no essential difference between the present case and that of *Hornblower* against Crandall, and for the reasons given in the opinion delivered in that case, the judgment of the court below is affirmed. All the judges concur."

Which opinion in the case of *Hornblower v. Crandall*, referred to in the above opinion, is reported at length in 7 Mo. App. 220, to which reference is here had. In addition to the points and authorities considered and disposed of by the court of appeals, in their said opinion, above quoted, and in the said opinion reported in 7 Mo. App., above referred to, and in which opinions, after careful examination, we concur; certain other questions have been presented and discussed, in this court, by the learned counsel, which we deem it proper to notice. These questions have reference to the survival and revival of the present action, upon the death of the original plaintiff Whiting, and as the facts in this case on those points, as far as they go, are in all essential particulars similar in principle to those in the case of *Baker v. Crandall*, ante, p. 584, and therein fully considered and disposed of at length, that case on these points must be taken as conclusive of this. The opinion in that case, it will be seen, affirms said survival and revival.

For the reasons, therefore, given in the opinion of that case, as well as those given in the opinions of the court of appeals, herein cited and approved, the judgment of the court of appeals herein is affirmed. All concur.

IN THE MATTER OF THE APPORTIONMENT OF THE RAILROAD  
SCHOOL TAX OF 1875 AND 1876, in *Caldwell County*.

**School Tax: RAILROADS.** The road-bed of a railroad is chiefly valuable as an entirety, and its subdivisions within the limits of a county, or a school district, are not to be treated as local property under the acts of 1875 for the assessment and distribution of railroad taxes. Acts 1875, p. 121, § 8; p. 129, § 12. The school taxes on such road-bed, apportioned to a county, are properly distributed to the school districts therein in the proportion that the number of school children in each district bears to the whole number in the county; and the act of 1875 providing for such distribution is not unconstitutional, as giving a portion of the taxes levied upon property in one district to another. *Wells v. City of Weston*, 22 Mo. 337, distinguished.

*Appeal from Caldwell Circuit Court.*—HON. E. J. BROADBUSH,  
Judge.

REVERSED.

*Crosby Johnson* for appellant.

*J. A. Holliday* for respondent.

HENRY, J.—The following are the agreed facts: The Hannibal & St. Joseph Railroad Company paid to the collector of Caldwell county the sum of \$5,737.47 as and for the school taxes on the value of railroad property apportioned to Caldwell county for the years 1875 and 1876. There are in the county sixty-nine school districts. Through twelve of these districts the road runs; and there are fifty-seven districts through which the road does not run. Plaintiffs filed their motion asking that all the school tax be distributed to the districts through which the road runs. The county court overruled the motion, and distributed the whole tax to the districts in the county in the proportion that the number of school children in such districts bore to the whole number in the county. Plaintiffs appealed to the circuit court. That court, on a hearing of the cause, ordered the school tax to be distributed as follows: (1)

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To the district in which the same are situated, all tax arising from lands, workshops, depots, etc., owned by railroad company. (2) To the districts through which said railroad runs, in proportion to their respective mileage, all tax arising on the valuation of the road-bed and railroad track apportioned to the county. (3) To all the districts in the county in the proportion that their school children severally bear to the whole number of school children in the county, all tax arising from all other property of the railroad company, except lands, workshops, depots, buildings and road-bed.

From this judgment an appeal has been prosecuted to this court. The transcript in the cause was lost or mislaid, and has recently been supplied, and we give the title of the cause, as it appears in the papers supplied. The distribution was made under the act of 1875. Section 8 of that act is as follows: "The board shall apportion the value of all lands, workshops, depots and other buildings belonging to or under the control of each railroad company, to the counties, municipal townships, cities or incorporated towns in which such lands, workshops, depots and other buildings are situate; and the aggregate value of all other property of each railroad company shall be apportioned to each county, municipal township, city or incorporated town, in which such road shall be located, according to the ratio which the number of miles of such road completed in such county, municipal township, city or incorporated town shall bear to the whole length of such railroad."

The road-bed is not land, within the meaning of the first clause of that section. The apportionment of railroad taxes to counties through which the road passes, is based upon aggregate values. The road-bed is chiefly valuable as an entirety. In no county is the tax apportioned in proportion to the value of that portion of the road-bed lying within the county. No means are provided for ascertaining it, nor is it anywhere in the section above copied, or in section 12 of the act of 1875, in relation to the distribu-

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tion of the school tax, contemplated that the value of the road-bed in the respective counties shall be ascertained. Section 12 is as follows: "For the purpose of levying school taxes in the several counties on railroad property, the several county courts shall ascertain from the returns in the office of the clerk of the county court the average rate of taxation levied for school purposes by the several local school boards or authorities of the several school districts through which each railroad runs, and shall cause to be charged to the said railroad companies school taxes at said average rate on the proportionate value of said railroad property so certified to said clerk of the county court by the State Auditor under the provisions of this act. And the said county courts shall apportion the said taxes, so levied, to the respective school districts in the county in the proportion the number of children in each district bears to the whole number of children in said county; Provided, that in cases where townships, cities or towns have subscribed to such railroad for the purpose of constructing the same, and shall have issued their bonds, or paid their subscriptions, the school taxes arising from assessment of railroad property in such township, city or town shall be distributed to the school districts in such township, city or town in the proportion that the number of children of school age in such district bears to the number of school children in such township, city or town; And provided, that each and every school district shall be entitled to the school taxes, or an amount equal thereto out of the taxes from said railroad companies, on all lands, workshops, depots and other buildings, lying in their respective school districts as shown by the maps or plats on file in the office of the clerk of the county court." The distribution to the counties is in proportion to the number of miles of the road, within the respective counties. The road-bed within the county is not treated by these acts as local property.

It is contended that the act of 1875 is unconstitutional in that it gives a proportion of the taxes levied upon prop-



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erty in one township, to others, and the case of *Wells v. City of Weston*, 22 Mo. 387, is cited as authority to sustain that view. It was held there that the legislature had no power to authorize the city of Weston to levy and collect a tax on property beyond its corporate limits. There is no analogy between that and this case. The county is a *quasi* corporation, divided for convenience into municipal townships under the jurisdiction of the county, and in the aggregate composing the county. If the legislature had authorized one county to levy and collect taxes upon property located in another, it would be an analogous case to that of the *City of Weston* above referred to.

If the act prescribing the mode of distributing the railroad school tax is unconstitutional, on the same ground, section 8 of the act 1875, *supra*, would be unconstitutional, for under that section a county receives taxes on the aggregate value of the property of the railroad company, wherever situated, without regard to the value of the property of the company located in the county. In *State v. Serence*, 55 Mo. 388, objection was made to that mode of apportioning the railroad tax, but the court observed that: "So far as the actual road-bed is concerned, it is not questioned that this is a sufficiently uniform and just manner of making the taxes." In *Washington Co. v. R. R. Co.*, 58 Mo. 376, Judge Lewis, for the court, said: "Thus one county may contain railroad property worth far more than that within another, and may yet receive a smaller apportionment for taxation by reason of having a less number of miles of road completed within its limits." In another part of the same opinion, he says: "The power (of the board) to increase or reduce is in like manner limited to the valuation of aggregates, and cannot be applied to divisible parts, whether by county boundaries or otherwise." If the taxes were levied upon the actual value of the road-bed in the county, disconnected from the road, as an entirety, but little revenue would be derived by the county

from this source, if fairly valued as a detached parcel of the road.

The State has full power to control the county revenue, and we see no objection to the mode which the legislature has seen proper to adopt for the distribution of the railroad school tax. *State v. County Court*, 34 Mo. 546; *School District v. Weber*, 75 Mo. 558; *State v. Holladay*, 70 Mo. 137.

The judgment of the circuit court is reversed and the cause remanded, with directions to that court to enter a judgment in accordance with the views herein expressed, which are in affirmance of the order made by the county court of Caldwell county. All concur.

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THE STATE V. HAYS, *Appellant*.

1. **Indictments.** Indictments are required to conclude "against the peace and dignity of the State." Const., art. 6, § 38. But the addition of the words "of Missouri," will not be ground of objection.
2. ———. An indictment found before section 1798, Revised Statutes 1879, became the law, was not indorsed "A true bill," nor signed by the foreman of the grand jury, but no objection was made on these grounds till the case reached this court. *Held*, that the defect was cured.
3. **Embezzlement by Public Officers:** SCHOOL FUNDS: STATUTE, CONSTRUCTION OF. Section 41 of article 3, chapter 42, Wagner's Statutes, (p. 459,) providing for the punishment of public officers embezzling public funds, was applicable as well to officials whose offices were created after that section became law as to those already existing. It included in its operation the "Township Trustee" provided for by the Township Organization Law of 1873, (Acts 1873, p. 100;) and under it that officer was liable for school funds misappropriated.
4. **Construction of Statutes.** In the construction of statutes the intention of the legislature is to be ascertained from the language used, and not from general inferences to be drawn from the nature of the objects dealt with.
5. **Criminal Law:** TWICE IN JEOPARDY. After a jury had been empanelled in a criminal case and before any evidence had been sub-

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mitted, the defendant interposed an objection to the sufficiency of the indictment. The objection was sustained, the indictment quashed and the jury discharged. The defendant having been afterward tried upon another indictment found for the same offense; *Held*, that he had not been twice put in jeopardy.

6. **Pleading, Criminal: TOWNSHIP ORGANIZATION.** An indictment against a township officer must aver that the county has adopted township organization. This is a thing of which the courts will not take judicial cognizance, and proof of it will not be received without a proper averment.
7. ——— : ——— : **EMBEZZLEMENT BY PUBLIC OFFICER.** An indictment against a township trustee charged that he had embezzled "public moneys belonging to the school fund of North township," in Dade county. Strictly speaking the moneys belonged to the sub-districts of North township, rather than the township itself. *Held*, however, that this did not invalidate the indictment. It was sufficient to allege that the funds embezzled were "public moneys," and the amplification in the charge did not vitiate or limit the proof.
8. **Practice, Criminal: OFFICER IN CHARGE OF JURY.** In the absence of evidence that either the officer in charge of the jury or any one else had any communication with the jury, the verdict should not be set aside because the officer did not take the special oath required by section 1910, Revised Statutes 1879.
9. ——— : **VERDICT.** Failure of the jury to find on all the counts of the indictment does not vitiate the verdict. It operates an acquittal as to the omitted counts.

*Appeal from Dade Circuit Court.*—HON. J. D. PARKINSON,  
Judge.

AFFIRMED.

*E. J. Smith* for appellant.

*D. H. McIntyre*, Attorney General, for the State.

**PHILIPS, C.**—The defendant was indicted at the October term, 1877, of the Dade circuit court for embezzling public funds held by him as trustee of North township in said county. At the trial of this indictment, at the October term, 1879, after the empanelling of the jury, the record recites: "Whereupon the State, by her said attorney, pro-

ceeded to offer testimony to sustain the issue upon her part, which testimony is by said defendant objected to, by way of demurrer to the sufficiency of the indictment in this cause, which objection by way of demurrer interposed by said defendant is by the court sustained, and said indictment is for naught held, and whereupon the jury is discharged from the further consideration of this cause, without prejudice to the rights of said State of Missouri or the defendant herein." At the same term of this entry the defendant was re-indicted for the same offense. There are three counts in the indictment, charging the same offense in varying forms. The jury returned a verdict of guilty on the second count, without assessing the punishment, or in form making any finding as to the other counts. The court thereupon assessed the punishment at five years in the penitentiary, that being the minimum punishment fixed by law.

The substance of the second count of the indictment on which the defendant was convicted is, that from 1875 to 1877 the defendant was elected to and held the office of township trustee of North township, in said Dade county; that said county had prior thereto adopted the township organization; that said office was a public office by virtue of the laws of the State; that defendant, by virtue of his said office, received for safe keeping, transfer and disbursement, the sum of \$500, of the public moneys belonging to the school fund of said North township, and that between the — day of April, 1876, and the — day of August, 1877, the defendant unlawfully, willfully and feloniously did embezzle and make way with the sum of \$436.71 of said public money, belonging to the school fund of said North township. The indictment then set out the proceedings had under the first indictment, manifestly for the purpose of preventing the bar of the statute of limitations; and concluded with the words "contrary to the form of the statute in such cases made and provided, and against the peace and

dignity of the State of Missouri." Defendant brings the case here on appeal.

I. The indictment was manifestly founded on section 41, article 3, page 459, Wagner's Statutes, which declares that: "If any officer, appointed or elected by virtue of the constitution of this State, or any law thereof, or if any agent or servant of this State, shall convert to his own use, in any way whatever, or shall use by way of investment in any kind of property or merchandise, or shall make way with or secrete any portion of the public moneys, or any valuable security by him received for safe keeping, disbursement, transfer, or for any other purpose, of which he may have the supervision, care or control, by virtue of his office, agency or service, every such officer, agent or servant, shall upon conviction, be punished by imprisonment in the penitentiary not less than five years."

The indictment is good under this section. We will dispose of the objections made to it as they occur. It is objected

1. INDICTMENTS. that it does not conclude, in the language of the constitution, "against the peace and dignity of the State." The only difference, if it may be so called, between that and the indictment, is, that the indictment adds the words "of Missouri." This objection is without merit. The added words are but what the constitutional language implies, and the addition in no wise enlarged, varied or changed the phrase or the sense.

II. It is alleged that the bill of indictment was not indorsed "a true bill," nor signed as such by the foreman of the grand jury. This objection comes for the first time in this court. Time and again it has been held by the Supreme Court that this objection comes too late after verdict. *State v. Mertens*, 14 Mo. 94; *State v. Burgess*, 24 Mo. 381; *State v. Harris*, 73 Mo. 287. This indictment having been found in October, 1879, section 1798, Revised Statutes 1879, does not apply.

III. It is next claimed, that at the time of the enactment of the section of the statute on which the indictment

3. EMBEZZLEMENT BY PUBLIC OFFICER: school funds: statute, construction of. is based, the township organization had not been provided for by legislative act; and, therefore, the office held by defendant was not in the purview of the said 41st section of the statute, and could not have been in the legislative mind at the time of its passage in 1870. This statute was necessarily prospective in its operation. It applied, by its terms, to the then existing officers of the State, of whatever grade, so that they only came into official being "by virtue of the constitution of this State, or any law thereof." As a corollary to this it would apply to any officer thereafter created, provided, only, that he be "appointed or elected by virtue of the constitution or any law thereof." The township organization was created by law pursuant to the constitution. So it remains only to be ascertained from the township law itself whether or not the office attributed to the defendant in the indictment, was provided for or created by the act for the organization of counties into townships. By section 2, article 4 of this act, (Laws 1873, p. 100,) the "township trustee" is one of the enumerated officers. All through the act he is recognized as an officer. Article 7 defines his duties. Section 1. "The township trustee of each township shall receive and pay over all moneys raised therein for defraying township expenses." From sections 3 and 6 it is manifest that among the moneys which it was in the contemplation of the legislature would come into his hands by virtue of his office, were school moneys.

But an argument in support of appellant's position, is sought to be drawn from the enlargement of the phraseology of the section in the statute of 1870, found in section 1326, Revised Statutes 1879. It is contended that the words "including as well all officers, agents and servants of incorporated cities and towns, or municipal townships or school districts" contained in the law of 1879 is an implied declaration of the legislature that such officers were not hitherto within the provisions of the statute. With as much logic might it be

4. CONSTRUCTION OF STATUTES.



asserted that sheriffs, county treasurers and collectors were not embraced in the law prior to this act of 1879; for following the words last quoted in section 1326, are these: "as of the State and counties thereof." So the whole of it in effect reads: "Including officers of the State, county, incorporated towns or cities, municipal townships or school districts." As well say that prior to the statute of 1879 a constable could not have been indicted under the statute of 1870 for embezzling funds in his official hands. Perhaps the most rational exposition of the particularity of the section in the revision, was to apply its provisions in explicit terms to the enumerated class, so as to leave no doubt in the mind of the querulous as to the large scope and comprehension of this statute, striking at a growing crime in the land, the misappropriation of public funds. The intention of the legislature must be ascertained from the words of the statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute. This is the enunciation of a learned judge in *Regina v. Doubleday*, 3 Ellis & Ellis Q. B. 514, where it is held that a statute enumerating "overseers of the poor, constables, assessors, collectors and any other persons whomsoever," meant just what it said, and applied to all persons, and was not restricted to the persons particularized in the act. Nothing could be broader or more comprehensive than the words "any officer" employed in the 41st section above quoted.

IV. It is urged that by being put to trial under the second indictment defendant was twice placed in jeopardy for the same offense. Without undertaking to discuss in detail the application of the rule or principle of law invoked, touching what constitutes jeopardy, it is sufficient, for the purposes of this case, to say that if the former indictment had been sufficient to sustain a conviction, and its further prosecution had been voluntarily abandoned by the State after the empanelling of the jury, and the reading of the indictment the defend-

5. CRIMINAL LAW:  
twice in jeopardy.

ant could not again be exposed to conviction upon the same charge. Cooley, in his admirable work on Constitutional Limitations, page 327, very succinctly asserts that a person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon an indictment which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance: "And a jury is said to be thus charged when they have been empanelled and sworn." There are exceptions to this general rule, among which is, that if the jury are discharged with the consent of defendant, expressed or implied; or if after verdict of guilty the same has been set aside on defendant's motion for a new trial, or the judgment arrested. *Commonwealth v. Stowell*, 9 Met. 572; *State v. Slack*, 6 Ala. 676.

It is to be observed that the defendant himself, before any evidence was submitted to the jury, interposed an objection to its admission upon the distinct ground that the indictment alleged no offense. It was in the nature of a demurrer to the bill, and the court thereupon, in effect, quashed the indictment, and stopped the cause, and discharged the jury at his instance, as he did not object.

I am satisfied furthermore, upon an examination of the first indictment that defendant's objection to it was well taken. The defendant was indicted as an officer of North township, apparently under the assumption that the county was acting under the township organization. There was no averment in the indictment that the county was so organized. This was essential, and it was a defect supplied in the second indictment. The courts will not take judicial cognizance of the existence of county township organizations. It is a fact so far resting *in pais* that proof thereof must be made, and to admit such proof there must, especially in so important a proceeding as indictment for felony, be an affirmative allegation of the fact. *Robinson v. Jones*, 71 Mo. 584; *Ober v. Pratte*, 1 Mo. 80; *Sumners v. Tice*, 1 Mo. 349; *Gorman*

6. PLEADING, CRIMINAL: township organization.

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*v. P. R. R. Co.*, 26 Mo. 453; *Southgate v. A. & P. R. R. Co.*, 61 Mo. 89, 95.

V. It is pressed as error that the indictment was defective in charging that the money embezzled belonged to the school funds of North township. It may be conceded that the moneys held by the defendant were distributable among the several school districts. But the fact remained that these moneys were of the funds which came to that township, a corporation, of which defendant was the financial custodian. In a sense they belonged to the township in trust for school district subdivisions. But it is a sufficient answer to this objection to say that this indictment was good, in that it alleged that it was "public money," and the amplification in the charge did not vitiate or limit the proof. *State v. Flint*, 62 Mo. 393.

VI. The record shows that the sheriff, who took the jury in charge when they retired to consider of their verdict, was not sworn as provided in section 1910, Revised Statutes 1879. The bill of exceptions states "that after the hearing of the argument of counsel, the jury retired to consider of their verdict, under the charge of an officer, the sheriff of Dade county, Missouri, who was not sworn as required by section 1910, page 320, Revised Statutes 1879."

This presents a question of much gravity and difficulty. We had occasion at the last April term to examine this point, in the case of the *State v. Hayes*, ante, p. 307. The facts of that case differ from this, in the circumstance that there the jury retired in charge of the sheriff, and were out one and a half hours before the sheriff was sworn, and he was sworn before he had any communication with the jury and before they had made their verdict. We held that did not constitute reversible error. As was said there, "the section of the statute (1910, R. S.) was designed to secure the jury against any outside influence, and even that of the officer in charge. And in a case where the precau-

tionary oath is not administered the court ought to be well satisfied that no harm has resulted therefrom to the prisoner." So it was held that as there was nothing in that case to give color to any suspicion that there had been any access to or communication with the jury from without, the object of the statute had been practically attained. The legislature sought by this provision to throw every possible safe-guard around the jury in its retirement in felony cases, and to stimulate the officer in charge to caution and silence by imposing upon him the obligation of an additional and special oath. And whilst it has been held in cases like those of *State v. Upton*, 20 Mo. 397; *State v. West*, 69 Mo. 401, and *State v. Baber*, 74 Mo. 292, that certain irregularities, such as furnishing intoxicating liquors to juries, or permitting them to visit improper places, while considering of their verdict, would not be sufficient ground for new trial, unless it was made to appear affirmatively that the irregularity or external intercourse did affect the verdict as a matter of fact, I am of opinion that the spirit and the letter of the statute under consideration, would be best observed and rendered effective by the trial court ordering a new trial where, without having obeyed the statutory requirement of administering the precautionary oath, it was manifest to the court that either the sheriff himself or any one else had been permitted "to speak or to communicate with the jury." The influence, so subtle and often almost impossible of proof, of such communications, will thus be so guarded against as to secure to the accused the full effect of the statutory safe-guard; and at the same time it will prevent interference with the verdict where there is nothing to indicate that the omission to administer the oath had worked any possible injury.

The record in this case shows that the jury retired, under charge of the court and the sheriff, and there is no proof whatever that he or any one else even spoke to the jury during their retirement. To vacate the verdict in such a state of case would be an observance of the mere

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Goddard v. The Merchants' Exchange of St. Louis.

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letter of the law without an intelligent recognition of its spirit.

VII. The failure of the jury to make an affirmative finding on the other counts of the indictment, is not reversible error. Where the jury find a verdict of guilty on one count, and are silent as to the rest, the law treats it as an acquittal as to such other counts. *State v. McCue*, 39 Mo. 113; 2 Bishop Crim. Pro., par. 837.

I have examined the instructions with some care, although the motion for new trial pointed out no specific objections to them, to satisfy my own mind that the accused has had a fair trial under the law of the land. While some of the instructions are very inartistically drawn, and standing alone might possibly have been liable to misconstruction, yet taken as a whole they conveyed clearly and unequivocally to the mind of an ordinarily intelligent jury the real issues under the indictment, and the law applicable thereto, and it is not manifest that they were probably misled by any one of the number given.

Finding no material error in the record, and being satisfied the defendant had a fair and impartial trial according to law, the judgment of the circuit court is affirmed. All concur.

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GODDARD, *Appellant*, v. THE MERCHANTS' EXCHANGE OF ST. LOUIS.

1. **Corporation By-Laws.** That the by-law of a corporation establishes a rule different from the common law rule does not make it invalid.
2. ———. A by-law of a board of trade which provides that "on all sales of grain in bulk on elevator receipts, the buyer shall pay the first ten days' storage, unless otherwise specified, at the time of sale," is not invalid, and may be enforced.\*

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\*These syllabi are taken from 9 Mo. App. 290.

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*Appeal from St. Louis Court of Appeals.*

AFFIRMED.

*Patrick & Frank* for appellant.

*Overall & Judson* for respondent.

PER CURIAM.—For the reasons given in the opinion of the court of appeals, the judgment is affirmed. The rule in question is not in conflict with the constitution of this State, or with the constitution of the United States.

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MARSHALL V. THE ST. LOUIS, KANSAS CITY & NORTHERN  
RAILWAY COMPANY, *Appellant*.

1. **Action by Passenger for being Carried Beyond Station: EXCESSIVE VERDICT.** In an action against a railroad company for carrying a female passenger beyond her station, the circumstances were such that the plaintiff was only entitled to recover for the loss of time and expense incurred in being taken past her station and back, and the jury were so instructed. The evidence showed that she lost two or three hours' time and paid \$1.50 for a returning conveyance. There was a verdict for \$1,000, reduced by remittitur to \$750, and judgment accordingly. *Held*, excessive, and judgment reversed.
2. — : **EXPRESS TRAIN NOT STOPPING AT WAY-STATION.** A passenger buying a ticket to D. station on defendant's road, was told by the ticket agent to take a particular train. She did accordingly. The train proved to be an express, not allowed by the regulations of the company to stop at D., but she did not know this until informed of it by the conductor after the train had started. She told him of the direction the agent had given her, and insisted on being let off at D. He took up her ticket, but refused to stop at D., and took her to the next stopping place beyond. In an action against the company; *Held*, that the plaintiff ought to have counted on the negligent misdirection of the ticket agent, not on the refusal of the conductor to stop, for he could not have done otherwise.



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*Appeal from Chariton Circuit Court.*—HON. G. D. BURGESS,  
Judge.

REVERSED.

*Wells H. Blodgett* for appellant.

*Samuel C. Majors, C. W. Bell and S. P. Houston* for respondent.

HOUGH, C. J.—The material portion of the petition in this case is as follows: That defendant, on or about the 11th day of October, 1878, for a reward, undertook and agreed to convey plaintiff safely from Kirksville, in Adair county, to Dalton, in Chariton county, but that wholly neglecting and disregarding its duty in that behalf, maliciously or wantonly and wrongfully refused to put plaintiff off at Dalton, but carried her on to Brunswick, and that by reason of said wrongful act of defendant she was damaged in the sum of \$5,000, for which she prays judgment. The defendant in its answer denied each and every allegation contained in the petition.

The plaintiff testified as follows: "I reside at Newark, Knox county, Missouri. On October 11th, 1878, I bought from defendant's agent at Kirksville a ticket from Kirksville to Dalton. I asked the agent if he could sell me a through ticket to Dalton (I knew I would have to make a change at Moberly), and he said he could. He got the ticket and I paid him for it. I asked what time the train would go out; it was then after eight o'clock, and he said the train left ten minutes after nine. I asked him what time it would get to Moberly, and he told me. I said, how long will I have to wait there, and he said something over two hours. I then paid him for the ticket. I then asked him if I would have any trouble in making the change at Moberly, or in getting off at Dalton, and he said 'no, madam, none at all; the officers all along this road are gen-

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plemanly and accommodating.' I got on board the train and went to Moberly, and got off there a little after twelve, and went into the waiting room. I was not informed at Moberly that the train did not stop at Dalton. I sat quietly in the depot over two hours. They said the train was behind time. It was in the night, but the train finally came along, and I got on board. The first time the conductor came along after I got on at Moberly, I handed him my ticket, and he said: I cannot put you off at Dalton, we do not stop there. I said: What did they sell me a ticket for, then? He said he would take me on to Brunswick, but could not stop at Dalton. I insisted that he should stop there, and he said: No, madam, we cannot stop there. Shortly afterward he came through the car again and I called to him and told him the circumstances; that my daughter-in-law was very sick, and he said: No, madam, I cannot put you off, I have no more right to put you off there than I have to stop at any farm house on the road; I cannot do it. A lady spoke up and said: If she had no ticket you would put her off—which seemed to annoy him, and he walked off. He came in the third time, and I called to him, and said: I have not a particle of baggage, and it won't detain you three minutes. He said: I understand the matter perfectly and do not intend to stop. His manner was rude and abrupt. He did not use any insulting language but was abrupt and impatient. He took me on to Brunswick, and I did not say any more at all. I got out at Brunswick, and got a carriage as soon as I could and went out to Mr. Redman's. It was ten minutes after nine when I got there, and I found my daughter-in-law had just died. I did not explain to the agent at Kirksville the circumstances under which I was going, but did explain to the conductor. I bought the ticket from the agent in the depot. I walked up to the door where everybody bought tickets and he sold me the ticket for \$3.25. At Brunswick I hired a conveyance to take me out to Mr. Redman's where my daughter-in-law was sick; that is three and a half miles

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from Dalton and twelve and a half from Brunswick. I paid for the conveyance \$1.50, and I got there ten or twelve minutes after nine. When the train passed Dalton it was not daylight, and the stars were shining when I got to Brunswick. The agent at Kirksville told me to get on the first passenger train. He told me to take the first train that came along after I got to Moberly, and that is why I took it.

*Cross-examination:* After I left Kirksville, the next conversation I had with the railroad officials was with the conductor after I left Moberly. The conductor said he could not put me off at Dalton. In the first conversation I had with the conductor he told me to go on to Brunswick. The conductor said he was near forty minutes behind time. He gave me the pass back from Brunswick to Dalton, but I objected. I said I do not want your pass, but he gave it to me. In the depot at Kirksville I did not see any notice posted up in regard to the running of trains. I cannot see to read very well after night, and I did not see anything of the kind. In the first conversation the conductor said Dalton was not on his bill to stop, and that is all he said at that time. In the next conversation he again said he could not stop. In the last conversation he said he was behind time, and he turned off in a rude and abrupt manner after the third conversation. He gave me the pass the first time. He said the train on which I would go back would reach Dalton after nine o'clock, and I said I cannot wait that long. The conductor on the train from Moberly to Dalton took up my ticket. He took it up when he first met me, and that is the time he gave me the pass, but I told him I did not want the pass, but that I wanted to stop at Dalton. In my last appeal I said, if you will slacken the speed of the cars, I will get off at the back of the car and risk the danger; and he said, I am not going to do it. This was in the third and last conversation, and his manner was rude and abrupt. I knew he was out of patience. I do not know that there was anything abrupt in the first

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two conversations, but there was nothing like kindness, there was barely politeness. The agent at Kirksville told me to take the first passenger train going to Dalton; that conversation occurred at the time I purchased my ticket at Kirksville. The agent told me to take the first train going to Dalton. I cannot say that he said those words, but that was it to the best of my recollection. This was all the evidence offered by plaintiff in the case.

The conductor of the train which carried the plaintiff beyond her destination, testified that his train was an express train, running from St. Louis to Kansas City, and that there were twelve or fourteen stations at which he did not stop; that said train was known as number three, and was not allowed to stop at Dalton, and on the occasion referred to he had no authority to stop his train at Dalton. Trains number one and two stopped at Dalton regularly. On the morning in question his train was behind time and arrived at Brunswick fifteen or twenty minutes late.

The following stipulation was then made in open court between the attorneys for plaintiff and defendant, to-wit: "It is admitted by counsel for the plaintiff that train number three, on which plaintiff got on board at Moberly, was the through express from St. Louis to Kansas City, and that by the time table and schedule of running arrangements in force on defendant's railroad at said date it was not advertised to stop at Dalton, and that Dalton was not a stopping place for said train by said schedule."

At the instance of the plaintiff the court gave the following instructions:

1. If the jury believe from the evidence before them that plaintiff purchased of defendant's agent at Kirksville a ticket from Kirksville to Dalton, and that at the time she so purchased the ticket, defendant's agent directed her to take the 9:20 p. m. train for Moberly, and to get on the first passenger train going toward Dalton after she arrived at Moberly, and that she did so, and that the conductor took her ticket and refused to let her off at Dalton, but carried

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her past to Brunswick, then they should find for plaintiff, unless they further believe from the evidence that before she got on the train at Moberly she knew that the train did not stop at Dalton.

2. If the jury find for the plaintiff they should assess the damages at a reasonable sum for loss of time and expense incurred in being taken from Dalton on to Brunswick, and from Brunswick back to Dalton, as they may believe from the evidence plaintiff is entitled to recover, not exceeding the sum of \$5,000.

At the instance of the defendant the court gave the following instruction:

1. If the jury believe from the evidence that plaintiff purchased a ticket for a valuable consideration of defendant's agent, and defendant thereby undertook to convey plaintiff as a passenger in its cars from Kirksville to Dalton, and that defendant's servants failed to stop its train upon which plaintiff was lawfully a passenger for Dalton, at said station, but carried her on to Brunswick, then they are instructed that plaintiff's measure of damages is the sum the evidence shows plaintiff expended to enable her to return to Dalton, the value of the time lost, and the inconvenience she suffered thereby, but they must allow the plaintiff nothing for and on account of the mental anxiety or suffering endured by her on account of the sick or dying condition of her daughter, occasioned by such delay in reaching her destination.

The jury returned a verdict for plaintiff and assessed her damages at \$1,000, of which the plaintiff remitted the sum of \$250, and the court thereupon rendered judgment for the plaintiff for \$750.

On the authority of the case of *Trigg v. St. Louis, K. C. & N. Ry Co.*, 74 Mo. 147, the judgment in this case must be reversed, because the damages are excessive. In the instruction given at the instance of the plaintiff, the jury were directed to assess the damages at such reasonable sum for

1. ACTION BY PASSENGER FOR BEING CARRIED BEYOND STATION: excessive verdict.



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loss of time and expense incurred in being taken from Dalton on to Brunswick, and from Brunswick back to Dalton, as they might believe from the evidence plaintiff was entitled to recover. The action of the jury in returning a verdict for \$1,000 on the testimony before them under this direction of the court, which was substantially repeated to them in the instruction given for the defendant, is such as to call for the interposition of this court. The verdict is without evidence to support it.

As the cause must be remanded, we think it proper to state that the petition should have counted on the negligent 2. —: express mistake or misdirection of the agent at train not stopping at way-station. Kirksville, and not on the refusal of the conductor to stop the train at Dalton. The conductor was not guilty of negligence in refusing to stop his train at Dalton, for he was forbidden to do so by the rules of the company; and if he had stopped there in violation of his duty and the regulations of the company, and injury had resulted to any one from such violation of duty, the company would have been liable therefor. If the conductor of a through train, which by the regulations of the company is permitted to stop only at a few important stations on its transit, can be required to stop his train at any way-station on the statement of a passenger that he was informed by some agent of the company authorized to give such information, that the train would stop at such station and that he had been directed to take that train, the movement of such train would virtually be withdrawn from the control of the company, and placed under the control of the passengers, and in lieu of that precision, regularity and security which should be required in the management of passenger trains, only uncertainty, irregularity and insecurity would prevail. In many instances the conductor would have no means of testing the good faith of the representations made to him by the passenger, and he would have to act blindly, at the risk of injury to his master, and to the passengers committed to his care. When any servant of a



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railroad company, having the requisite authority, misdirects a passenger to his injury, the company should be responsible therefor, but in an action for such injury, the petition should be founded upon such misdirection.

The judgment will be reversed and the cause remanded. The other judges concur, except RAY, J., who having been of counsel did not sit.

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WALTHERS V. THE MISSOURI PACIFIC RAILWAY COMPANY, *Appellant*.

1. **Railroads: KILLING STOCK; ORDER OF PROOF.** In an action under the double damage act for killing stock, evidence offered by the plaintiff of the condition of the fencing at the point where the stock was killed, and which also furnished circumstances from which a reasonable inference could be drawn that such stock had there entered upon the railroad track; *Held*, admissible and properly submitted to the jury; *Held*, also, that proof of the condition of the fencing at a particular point was, in the discretion of the court, properly admitted before proof, or an offer to prove, that such stock entered upon the railroad at that point.
2. ———: ———: **FENCES.** Where a railroad company erects and uses diligent effort to maintain its fences, but strangers throw them down, it will not be liable for the killing of stock which enter upon its track through the breach.

*Appeal from Cole Circuit Court.*—HON. E. L. EDWARDS,  
Judge.

REVERSED.

*Thomas J. Portis and Smith & Krauthoff* for appellant.

*M. J. Leaming and Edwards & Davison* for respondent.

WINSLOW, C.—This action was originally commenced before a justice of the peace, in Cole county, Missouri, under the double damage act, for killing stock belonging to

plaintiff. There was a judgment by default before the justice, an appeal to the circuit court, where there was a trial by jury, which resulted in a verdict for plaintiff for \$100, which was doubled by the court, and judgment rendered against defendant thereon for \$200. To reverse this judgment, defendant brings the case here by appeal. Many questions are made on the record as to the sufficiency of the complaint, the jurisdiction of the justice, etc., but, since the recent numerous decisions of this court on these points, counsel for appellant have wisely abandoned them. The only questions now urged grow out of the introduction of testimony, and the action of the court on the instructions.

Plaintiff testified in his own behalf, that he was owner of the cows sued for, and that they were killed on defendant's track, at a point where there were cultivated fields on both sides of said railroad, and that he resided in Liberty township, Cole county; the fence was not more than two feet high where the cows were killed, and along the lane, east of where they were killed, about a half a mile, the fence was not more than four or five rails high; the cows were killed dead, and were appraised at \$100; I saw tracks on the railroad near where they were killed. On cross-examination, he said the animals were killed thirty or forty yards east of the Moreau bridge; and that he did not know of a place near where they were killed, where the fencing was often thrown down by persons going through. His other witnesses made similar statements as to this place in the fence.

John Walthers testified: I saw the cows. The Pacific railroad killed them—three head. It is cultivated fields on both sides of the railroad there. I think \$40 per head is reasonable for the cows. The fence is bad where the animals were killed. The fence was not more than two or three feet high. I saw tracks on the railroad. We could not see any tracks east of where the cows were killed. The weeds and grass were very thick.

Geo. A. Walthers testified: I know these cows; two

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cows and one heifer. I saw them on the railroad; saw their tracks on the railroad. Two were killed dead, the other died in about an hour after. It is cultivated fields on both sides of the railroad where the cows were killed. The fence is poor, many rails are rotten. Fence is sometimes three, four, five, six and sometimes seven rails high. The cows were worth \$40 each.

This was all of plaintiff's evidence.

Defendant introduced George Coleman, who said: I am now and was when the cattle were killed, foreman on this section where they were killed. They got on the railroad track ten rods east of the Moreau bridge. The railroad fence was down on both sides, thrown down by some one that night. The farmers on the north and on the south side of the railroad cross there on mules and horses so as to cut off some distance, and they always leave the fence down. My men put that fence up five times a week sometimes. We always put it up good when we found it down, without any delay. I, with my men, put this fence up good the morning before these cattle were killed. The morning the cattle were killed I came down to them. I then went to the place where people throw the railroad fence down. It was down again. I tracked these cattle right into this gap in the fence. Some fresh cow-dung was on the rails where they stepped over them. I then tracked them from the gap straight to where they were killed. I also saw where they had grazed along up to where they were killed. I put this fence up again.

F. Hardwick testified: I work on the section where the cattle were killed. I remember where they were killed. We put the fence up good at a place near Moreau bridge the morning before these cattle were killed. I saw the tracks where the cattle came in, about two telegraph poles from Moreau river. The fence is often down there. We often find it down, and always put it up when we find it down. It was down when we came to look at the cattle. We put it up good the morning before.

On this evidence the court instructed the jury for plaintiff as follows:

1. If the jury find from the evidence that plaintiff was, on or about the 2nd day of August, 1879, the owner of the three cows mentioned in the complaint, and that said cows got on the road of defendant where the same runs through, along or adjoining an inclosed or cultivated field, and that defendant did not have erected a good and substantial fence on the sides of its railroad, of the height of at least five feet, or have then and there cattle-guards at road-crossings at such points where said railroad passes said cultivated field sufficient to prevent cattle from crossing; that said cows were killed at the time aforesaid by defendant's engine or train of cars, and that the same was done in Liberty township, in Cole county; then the jury will find for plaintiff and assess his damages at whatever sum they may believe he has sustained by reason of the killing, not to exceed the amount claimed.

And refused to instruct the jury for defendant as follows—the first asked being in the nature of a demurrer to the evidence:

2. If the jury believe from the evidence that plaintiff's cattle got upon defendant's right of way in consequence of the fence belonging to defendant having been thrown or otherwise taken down at the point where said cattle got upon defendant's right of way, and that defendant's servants put the fence up at said point whenever they found it was down, and that defendant's servants had put up the fence at such point the morning before the said animals were killed, then defendant is not liable, and this, although the jury may believe from the evidence that defendant's fence was not lawful at other places, at or near where said animals were killed.

We do not think the trial court erred in admitting plaintiff's testimony under the complaint; nor in refusing defendant's first instruction, to the effect that under the pleadings and evidence

1. RAILROADS: killing stock: order of proof.

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plaintiff was not entitled to recover. Plaintiff testified positively that the "cows were killed on defendant's track at a point where there were cultivated fields on both sides of said railroad." John Walthers said "It is cultivated fields on both sides of the railroad there," meaning where he saw the stock dead. Geo. A. Walthers said: "It is cultivated fields on both sides of the railroad where the cows were killed." Other evidence proves clearly that the fencing was down and in bad condition at the point designated by these witnesses. This, and other evidence shown by the record, tended to sustain the complaint, and was sufficient to justify the submission of the case to the jury. There was not an entire failure of proof.

But counsel insist, and objected to the introduction of the evidence on the ground that plaintiff should not have been permitted to offer any evidence of the condition of the fencing at the point in controversy, without first establishing or offering to establish that the animals entered the right of way at that point. Plaintiff offered no direct and positive evidence to this effect, but the evidence objected to furnished strong circumstances from which the jury might reasonably infer that such was the fact. The order in which evidence shall be given to the jury is largely within the discretion of the trial court; and we cannot see that there was any abuse of that discretion in this case. *Powell v. Railroad Co.*, 35 Mo. 457; *State v. Daubert*, 42 Mo. 239; *Cross v. Williams*, 72 Mo. 577; *Russell v. Berkstresser*, 77 Mo. 417. Nor can it avail that defendant's evidence was positive to the contrary; for that circumstance, at the most, only called for a rule, not applicable here, to the effect that it should be given more weight. *Sullivan v. Railroad Co.*, 72 Mo 195. Besides, defendant's evidence was very little less positive than plaintiff's, as will be seen on examination.

The court erred in refusing defendant's second instruction. It has long been settled in this State that under the double damage section of the statute, the plaintiff must allege and prove that his fences. —:

stock got upon the railroad track at a point where the company was bound to fence; and, failing in this, there could be no recovery. *Cecil v. Railroad Co.*, 47 Mo. 246; *Clardy v. Railroad Co.*, 73 Mo. 576. Plaintiff's evidence tended to establish these facts, and was sufficient to justify the instruction given for him, and the submission of his case to the jury. But the rule is equally established, as concisely stated by HUGH, J., in *Clardy v. Railroad Co.*, 73 Mo. 578, and SHERWOOD, C. J., in *Case v. Railroad Co.*, 75 Mo. 670, that: "After fences have once been erected as required by law, the company is only liable for a negligent failure to maintain such fences, and it is, therefore, entitled to a reasonable time in which to make repairs, after having knowledge of a defect therein, or after the period has elapsed, in which, by the exercise of reasonable diligence, it could have had knowledge of such defect. *Shearman & Redfield on Neg.*, § 459, and cases there cited." *Clardy v. Railroad Co.*, 73 Mo. 576; *Case v. Railroad Co.*, 75 Mo. 668.

Now, the defendant's uncontradicted evidence plainly tended to show that at the point where plaintiff's stock went upon the track, it had erected and diligently maintained lawful fences, down to the very day of the accident; that neighbors passing on horseback threw the fencing down, for their own convenience, as they were in the constant habit of doing, and that in consequence thereof, plaintiff's stock got upon the track and were killed. It was the purpose of defendant's second instruction to submit these facts to the jury, and under the evidence and the cases above cited, it should have been given. If the court was not satisfied with its form, it should have put it in proper form, and submitted the defense to the jury.

The judgment should be reversed and the cause remanded. All concur.

*A motion for rehearing was overruled.*



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Sloan v. Torry.

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SLOAN V. TORRY *et al.*, Appellants.TERRY V. TORRY *et al.*, Appellants.

1. **Fraudulent Conveyance.** Land conveyed by an insolvent without valuable consideration, and acquired from the grantee with knowledge of that fact, will be subject in the hands of the purchaser to the demands of the creditors of the insolvent; and, if he exchanges for other land, the latter becomes also subject to their demands.
2. **Statute Laws of Sister States:** COMMON LAW. Judicial notice will not be taken of the statutes of a sister state; and it will not be presumed that the common law is in force in the state of Louisiana.
3. **Husband and Wife:** WIFE'S PROPERTY. In the absence of evidence that property in the name of a married woman acquired during coverture has been paid for by her separate means, the presumption of law is that it was paid for with those of the husband; and in such case it is not within the protection of the statute, (R. S. 1879, § 3295,) securing to the wife the moneys arising from the sale thereof.
4. —. The promise of a husband to repay his wife the proceeds of land which belonged to her, but not as her separate estate, and which has been disposed of and used by him with her consent, is without sufficient consideration to make her his creditor.

*Appeal from Jackson Special Law and Equity Court.*—HON.  
R. E. COWAN, Judge.

AFFIRMED.

*Comingo & Slover and Wooldridge & Daniel* for appellants.

*R. O. Boggess and R. T. Railey* with *C. W. Sloan* for respondents.

HOUGH, C. J.—These are separate suits, but the issues being the same in each, they were tried as one. Plaintiffs seek to subject to the payment of debts due them from one L. M. Torry, deceased, which were duly allowed against his estate, a certain tract of land in Cass county, the legal title to which is vested in the defendant Evans. On the

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26th day of September, 1870, L. M. Torry, husband of the defendant, Henrietta E. Torry, died intestate and insolvent. About three weeks before his death he negotiated for a certain house and lot in Harrisonville, Cass county, belonging to the defendant Evans, the son-in-law of Mrs. Torry, and then directed him to make the deed to his wife Henrietta, the defendant. The defendant Evans executed a deed as directed to his co-defendant, Mrs. Torry, on the 26th day of September, 1870, which deed was dated September the 19th, 1870, and was acknowledged and delivered on the 26th day of September, 1870. The deed was dated on the 19th because that was the day on which the attorney had been requested to prepare it. The deceased stated to the defendant Evans and to others, that he had this property conveyed to his wife because he had sold property belonging to her, situate in New Orleans, and had spent the proceeds of said sale, and he intended to make it up to her in property in Harrisonville. The defendant Evans was administrator of the estate of the deceased and knew the condition thereof. While he was administrator, Evans negotiated a trade of the property conveyed by him to Mrs. Torry, to one Don C. Davis, for the property now sought to be subjected to the payment of plaintiffs' demands, and, in pursuance of said trade on August 5th, 1871, the Harrisonville property was conveyed to Davis, and on August 14th, 1871, Davis conveyed the property involved in this suit to the defendant Evans, who testified that he paid Mrs. Torry \$2,000 and Davis \$1,000, the price of the Davis property being \$3,000, and that of Mrs. Torry \$2,000. The plaintiffs' demands amount to about \$1,000.

Regarding for the present the conveyance by the decedent, through the defendant Evans, to Henrietta Torry, as being voluntary, and the land thereby conveyed as therefore subject to the payment of his debts, it seems quite plain that the estate acquired by Evans from Davis, through Mrs. Torry, with knowledge of the fact that the conveyance to her was vol-

1. FRAUDULENT CON-  
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untary and that the deceased was insolvent, will be subject to the satisfaction of the plaintiffs' demands. *Allen v. Berry*, 50 Mo. 90. This transaction was, in effect, a purchase by Evans of Mrs. Torry's property, with notice that it was subject to the claims of creditors, and an exchange by him of said property for the Davis property.

To meet this condition of things, and for the purpose of showing that Mrs. Torry was a creditor of her husband 2. STATUTE LAWS OF SISTER STATES: common law. when he caused the Harrisonville property to be conveyed to her, the defendants introduced testimony showing that, in 1868, the defendant, Henrietta Torry, held in her own name certain real property in the state of Louisiana, which her husband sold under a power of attorney from her, and used the proceeds, and after his return to this state he told his wife that she should not be the loser by it, and that he would pay her every cent of the money used by him. He did not tell her, however, what he received for the Louisiana property, but it elsewhere appears that it was about \$2,000. So far as the laws of Louisiana may have any bearing upon the rights of the parties to this controversy, they cannot be regarded in making our decision, as they were not offered in evidence, and we cannot take judicial notice of them, nor can we presume that the common law is in force in that state. *Flato v. Mulhall*, 72 Mo. 522.

In the absence of evidence that the property in Louisiana was paid for by the separate means of Mrs. Torry, the 3. HUSBAND AND WIFE: wife's property. presumption of law is, it having been acquired during coverture, that it was paid for with the means of her husband. *Gault v. Saffin*, 44 Pa. St. 367; *Seitz v. Mitchell*, 94 U. S. 580; *Weil v. Simmons*, 66 Mo. 620. In *Sumner v. McCray*, 60 Mo. 493, it was held that our statute, first enacted in 1865, which makes the rents, issues and products of the real estate of any married woman and all moneys and obligations arising from the sale of such real estate which belonged to her before marriage, or which she may have acquired by gift, grant or

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devise during coverture, exempt from seizure, during coverture, for the debts of the husband, was intended to secure to the wife free from the control of her husband, all moneys arising from the sale of her real estate, which she possessed before marriage, or which she acquired with her own money obtained by gift, grant, devise or inheritance after marriage. Under this decision, if real property be acquired with the money of the husband, or by gift from him, and it be sold and converted into money, such money is not within the protection of the statute. The relations of Mr. and Mrs. Torry to the proceeds of the Louisiana property must be determined, therefore, by the law as it stood before the passage of the act of 1865, now embodied in section 3295 of the Revised Statutes.

In the case of *Tillman v. Tillman*, 50 Mo. 40, this court said: "When land is held by the wife simply as her own  
4. — and in which the husband has marital rights, if she join in the sale and the proceeds are collected by him in his own name, used as he uses his other funds, there being no contract or understanding with the wife in regard to them, they are reduced to possession, are appropriated by him, and by her presumed consent. The only thing relied upon to show the intention to hold the money for her use, is the fact that in entering the receipts upon the books of account, it was shown that they were proceeds of her land. There was no investment in her name, no charge to himself and credit to her, and there is no evidence whatever that he intended or she desired him to hold the amounts collected to her separate use. He was himself wealthy, and there was no special inducement in her to look after these comparatively small sums. They might easily have been secured to her, she might have made it a condition to parting with the land; but nothing being done in this direction, the proceeds of the sale became a part of the husband's estate, in which she has a large interest as wife, but none as creditor."

In the case at bar, no condition was attached by Mrs.

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The State v. Klein.

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Torry to the sale of her land. True, it could not be disposed of without her consent; but when disposed of, as the land was not her separate property, the proceeds were not her separate property, and being choses in possession and not protected by the statute, the husband could lawfully use the same, and no subsequent promise by him to pay her back would make her his creditor so as to justify the preference attempted in her behalf by the conveyance from Evans to her. She took subject to the claims of the creditors. *Terry v. Wilson*, 63 Mo. 493. If the real property in Louisiana had been disposed of upon a prior or contemporaneous promise of the husband to hold the proceeds for her, or to account for the same, she would then stand as to such proceeds upon the footing of a general creditor, and the preference in her favor could be upheld. But we fail to find any such agreement or understanding in this record. The husband appropriated the proceeds of the sale as he lawfully might, and any subsequent promise made by him to repay her is without sufficient consideration to make her a creditor.

The judgment of the law and equity court, which was for the plaintiff in each case, will, therefore, be **affirmed**. The other judges concur.

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THE STATE V. KLEIN, *Appellant*.

1. **Practice, Criminal.** The objection that an indictment is multifarious, must be raised by motion before trial.
2. **Selling Liquor Without License: INDICTMENT.** An indictment may charge in a single count a violation both of the dramshop law and of the wine and beer-house license law.

*Appeal from Clinton Circuit Court.*—HON. G. W. DUNN,  
Judge.

AFFIRMED.

*R. Hughes* for appellant.

*D. H. McIntyre*, Attorney General, for the State.

PHILIPS, C.—At the April term, 1879, of the Clinton circuit court the defendant was indicted for selling liquor without a license. The indictment is in the following words: "The grand jurors of the State of Missouri, for the body of Clinton county, upon their oath present, that one Henry Klein, on the 15th day of February, 1879, at the county of Clinton aforesaid, unlawfully then and there did sell to a person to these jurors unknown, intoxicating liquor in certain quantities less than one gallon, to-wit: one pint of whisky for five cents, one pint of brandy for five cents, one pint of wine for five cents, one pint of lager beer for five cents, one pint of ale for five cents, one pint of gin for five cents, without taking out a license, without being a dealer in drugs and medicines, and without having any license or legal authority to authorize him so to do, against the peace and dignity of the State."

There was no motion to quash this indictment, but on the trial the defendant's counsel objected to the introduction of any evidence thereunder, for the reasons: that the indictment is insufficient and multifarious, in that it charges two offenses in the same count; it charges in one count a violation of the dramshop law and of the wine and beer-house license law; and because the indictment fails to negative the proviso in the penal section of the wine and beer license law. The court overruled the objections and defendant excepted.

The bill of exceptions shows that the State offered and introduced evidence tending to show that defendant did sell



beer at a picnic in said county, within one year next before the finding of the indictment, and that as one of the so-called officers of a club-house in the city of Plattsburg in said county, he sold one drink of whisky. On this evidence, under the instructions given, the jury found the defendant guilty, and assessed the fine at \$40. After ineffectual motions for new trial and in arrest, the defendant brought the case here on appeal.

I. The indictment is good under section 2, chapter 48, Wagner Statutes. It is not obnoxious to the objection of multifariousness. If it were the objection should have been raised by motion before trial. The indictment in this case is, in terms, the same as that in the *State v. McGrath*, 73 Mo. 182, where it is held that the license of a dramshop keeper authorizes the sale which a wine and beer-shop keeper may make by virtue of his license. This being so, it cannot be maintained that the indictment embraces in one count separate offenses arising under distinct statutes. Besides, the evidence tended to show a sale of both beer and whisky by this defendant, which was well charged in the indictment, and after verdict will sustain the judgment. *State v. Wishon*, 15 Mo. 503.

II. The instructions are unobjectionable, and as the defendant failed to show any license, or to bring himself within any of the exceptions exempting him from the penal liability, the verdict and judgment are well sustained.

The judgment of the circuit court is, therefore, affirmed. All concur.

ADAIR V. ADAIR, *Plaintiff in Error.*

1. **Statute of Frauds: PART PERFORMANCE.** Taking possession of land under a verbal contract of purchase, reception of the products thereof, and payment of part of the purchase money, constitute a sufficient part performance to take the transaction out of the statute of frauds.
2. **Vendor's Lien: STATUTE OF LIMITATIONS.** Where the vendor has delivered possession to the vendee, but retains the legal title under a contract to deliver a deed when the purchase money is fully paid, the holding of the vendee will not be deemed adverse, and the statute of limitations will not begin to run in his favor until he has made full payment.
3. ———: ———: **WAIVER.** In a suit to enforce a vendor's lien upon land, the legal title to which the vendor retained in himself, the vendee pleaded the statute of limitations. He also pleaded that he had made full payment and demanded a deed, but the vendor had refused to deliver one, and prayed for general relief. *Held*, that this latter plea and prayer constituted a waiver of the plea of limitation.
4. **Vendor and Vendee: ESTOPPEL.** A purchaser at executor's sale cannot at the same time claim under the sale and also plead that the sale was not made in accordance with the order of court.

*Error to Morgan Circuit Court.*—HON. E. L. EDWARDS,  
Judge.

**AFFIRMED.**

*A. W. Anthony* for plaintiff in error.

*Draffen & Williams* and *B. R. Richardson* for defendant in error.

MARTIN, C.—This was a suit in equity, commenced on the 20th day of March, 1879, which had for its object the enforcement of a vendor's contract security for the purchase money of land sold by him but not deeded. The plaintiff, as executor of his father's will, had been authorized by decree of court to make sale of the real estate devised by the testator, collect the proceeds thereof and make distribution among the heirs or devisees, who were quite numerous. It

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is alleged in the petition that, in pursuance of the decree, he made sale of certain tracts of the land to the defendant, who was his brother, being one of the heirs of the testator, on the 13th day of April, 1864; that the consideration price was \$1,730, and that it was agreed at the time of the sale that the defendant, instead of paying down all in cash, might settle with the heirs or devisees for their respective portions of the purchase money, and produce to plaintiff their receipts therefor, which should be accepted by plaintiff in lieu of cash and credited on the purchase price; that in pursuance of this agreement the defendant paid a number of said shares; but that the precise amount so paid was unknown to plaintiff; that the defendant refused to settle and turn over the receipts so taken; that the amount of purchase money remaining unpaid is \$600, for which judgment is asked against the land, and that defendant's equity therein be foreclosed, and for all proper relief.

The amended answer admits the agreement and contract of purchase as stated, and denies all other matter. It also contains a plea of the statute of frauds together with a plea of the statute of limitations. The answer sets up special matters of defense consisting of an alleged agreement on the part of plaintiff to pay all taxes due on the real estate along with such as should accrue before delivery of deed; that defendant had paid all the purchase money and demanded a deed, which the plaintiff refused to deliver; that plaintiff failed to pay the taxes as agreed, and that defendant had been compelled to pay \$300 to settle outstanding claims for taxes, which claims were paid at the request of plaintiff. The answer contains a prayer for a judgment for the amount expended for taxes and for such other orders and judgments as may seem right and proper in the premises. To this new matter the plaintiff made reply putting the same in issue.

There was no controversy at the trial about the main features of the contract of sale as alleged by plaintiff. It appears that defendant was to pay the \$1,730 for the land;

that he was to have the privilege of settling with the heirs for their respective portions, and to turn their receipts over to the plaintiff in lieu of cash, so that he might use them in his settlements in the probate court; that the deed was to be retained until full payment should be made of the purchase money or settlement by production of receipts; that the defendant entered into possession of the land, paid most of the purchase money in pursuance of the agreement; and has used and enjoyed the land as his own, receiving its profits and products up to the present time; that defendant had paid the taxes claimed to have been paid by him, receiving therefor a quit-claim deed from the holder of the tax claim.

It appears that the last payment on account of the purchase money was made on the 10th day of March, 1869, being ten years and ten days before the institution of this suit. It also appears that a short time before the institution of the suit, the plaintiff endeavored to settle with the defendant, and that in the interview or accounting which took place they disagreed about the amount which the defendant claimed to have paid and about the item of taxes. The defendant claimed to have made some payments which plaintiff would not admit, but he did not repudiate or deny the contract under which he purchased or the relation which it established between him and the plaintiff in respect to the land. It also appears that the plaintiff executed a deed for defendant and was ready to deliver it as soon as settlement for the purchase money should be had. A deed to that effect was tendered in court. There was a conflict of evidence as to the plaintiff's promise to pay taxes; a conflict also as to two or three payments claimed to have been made to the heirs. Upon the evidence the court found in favor of the plaintiff and entered a decree in the sum of \$698.48 against the land as a lien in favor of plaintiff, and ordered that it be enforced by sale of the land. No personal judgment against the defendant was given. The case comes here by writ of error to this action of the court.

Adair v. Adair.

The first objection to the decree is, that the contract enforced was within the statute of frauds. Under the  
1. STATUTE OF FRAUDS: part performance. decisions of this court the objection cannot be sustained. The contract for the sale of the land was executory. The defendant took possession under it, paid most of the purchase money and received to his own use the profits and products of the land. These facts constitute sufficient part performance to take the transaction out of the statute. *Tatum v. Brooker* 51 Mo. 148; *Price v. Hart*, 29 Mo. 171; *Charpiot v. Sigerson*, 25 Mo. 63.

The objection founded on the statute of limitations presents more difficulty. No promissory note or written  
2. VENDOR'S LIEN: statute of limitations. obligation represents the debt, therefore, an action at law to collect it as a personal demand is barred in five years. If the plaintiff had nothing more by way of security than a vendor's lien, a question might occur whether it had any existence after the period of limitation which bars an action on the debt. It has been held in New York, and in some other states, that a vendor's lien which is not evidenced by any deed or supported by any title, is a mere creature of equity, incident to the debt, and that it has no existence after the right of action on the debt is barred. *Borst v. Corey*, 15 N. Y. 505; *Trotter v. Erwin*, 27 Miss. 772; *Littlejohn v. Gordon*, 32 Miss. 235. But it is unnecessary to express any opinion on this point, for the reason that the plaintiff's right is not raised by implication of law but rests upon a title which he retains in himself for the purpose of preserving and enforcing it. This peculiar lien is often referred to as a vendor's lien, for convenience of expression, as it seems to have no definition of its own. In *Adams v. Cowherd*, 30 Mo. 458, a case in which the vendor had retained the legal title after giving out a contract to sell in form of a title bond, Judge Scott says: "It is obvious that the vendor who retains his legal title and merely gives a bond to convey, is in a very different situation in regard to the land he has sold, than he who

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has made an absolute conveyance conveying away the legal title. Where the vendor retains the legal title, the transaction on its face shows that he intends to hold such title as a security. It is just the same as if the vendor had conveyed the land and afterward taken a re-conveyance by way of mortgage to secure the payment of the purchase money." See also to the same effect *Strickland v. Summerville*, 55 Mo. 165.

Now, it seems to me, that a vendor with the legal title reserved, is in a stronger position than either an equitable lien holder or mortgagee, for the reason that he depends upon an unbroken legal title which he has not assumed to part with, but expressly holds for his security. Certainly so far as the statute of limitation is concerned, he is in a stronger position for the simple reason that his contract of sale remains executory. As long as the contract of sale is executory on both sides, the vendee occupies a subordinate relation, which has been likened to the relation between landlord and tenant. *Ash v. Holder*, 36 Mo. 163; *Lockwood v. Railroad Co.*, 65 Mo. 233. It is only in favor of the party who has fully performed the executory contract the statute will vouchsafe the advantages of an adverse holding. *Tibbeau v. Tibbeau*, 19 Mo. 78; *Ridgeway v. Holliday*, 59 Mo. 444. Until the vendee could prove that he had performed the contract on his part by payment of the whole purchase money, the statute would not start to run, and he would remain subject to the subordinate relation imposed upon him by the executory contract, which would fall short of an adverse holding. A plea of the statute of limitation in a suit by the vendor to enforce his right to the unpaid purchase money against the vendee, or against the land, might possibly operate as a rescission of the contract of sale, but it would not help the vendee to acquire the legal title, which the vendor had retained for his security. The plea of the statute which defeats the plaintiff's right to the purchase money, is not regarded in equity as equivalent to the plea of payment, which recognizes the contract of sale and en-



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titles the vendee to performance of it by the vendor in a conveyance of the title held by him.

It is unnecessary to consider in this case whether a mortgagee under the recent decisions of this court, which regard the statute of limitation as applying to all actions against realty whether equitable or legal, could either in equity or law enforce his demand against the realty covered by his mortgage, after the lapse of ten years, notwithstanding intimations to that effect in *Chouteau v. Burlando*, 20 Mo. 482, and *Wood v. Augustine*, 61 Mo. 46. See *Hunter v. Hunter*, 50 Mo. 445; *Rogers v. Brown*, 61 Mo. 187. The position of the plaintiff is not that of a mortgagee who has parted with his title and seeks to enforce an unpaid mortgage against another man's legal estate. He retains the legal estate, sets out an executory contract and alleges non-performance of it on the part of the purchaser. The purchaser admits the contract and that the legal title is in the vendor; does not ask for a rescission of it; takes issue with the vendor on the fact of full performance by payment of the purchase money, is beaten on that issue and found to have not paid it all by about \$700.

Moreover, in his answer he pleads not only payment of the purchase money which would entitle him to a deed, 3. —: —: waiv-  
er. but he alleges a refusal on the part of the vendor to deliver one, and concludes with a prayer for general relief, which is equivalent to a prayer for compelling the vendor to complete the contract by delivery of deed, if the fact of payment should warrant and entitle him to such a decree. He cannot plead the statute of limitation, which would rescind the contract and leave the title in the plaintiff, and at the same time insist on having performed it on his part, which entitles him to a deed, and ask to have the title taken out of the plaintiff and vested in him by delivery of a deed. The facts alleged in his answer along with his prayer for relief, constitute a waiver of the plea of the statute.

As to the finding of the court on the facts of the case

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about the unpaid purchase money, and the supposed promise of plaintiff to pay taxes, I have only to say that it is in my opinion well warranted by the evidence, and ought not to be disturbed by the appellate court.

The defendant objects that the terms of sale which were entered into between him and the plaintiff were not in compliance with the order of the court  
4. VENDOR AND VENDEE: estoppel: authorizing the sale. After acquiring possession and claiming title in pursuance of such terms, he cannot be allowed to impeach the sale on account of any discrepancy between them and the order of the court.

The judgment is affirmed. All the commissioners concur. NORTON, J., concurred in the result.

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WILLIAMSON, *Appellant*, v. BALEY.

1. **Set-off: TENDER.** A plea of set-off accompanied by a deposit in court, as a tender, of the amount of the difference between plaintiff's demand and the set-off claimed, is a conclusive admission of the justness of plaintiff's demand, and will entitle the plaintiff to recover the amount of his demand, less such sum, if any, as the jury may find to be due from him to the defendant on the set-off.
2. **Money Loaned for Gaming.** Money knowingly loaned for the purpose of being used in betting on a game of chance, and actually so used, cannot be recovered.

*Appeal from Buchanan Circuit Court.*—HON. JOS. P. GRUBB, Judge.

REVERSED.

*B. P. Williamson pro se.*

*C. F. Booher* for respondent.

HOUGH, C. J.—This is a suit originally instituted before a justice of the peace in Andrew county on an account for

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\$2, for medical services. The defendant filed a set-off for \$1.50 for money loaned and twelve cents interest thereon, and deposited with the constable the sum of fifty cents and all costs then accrued, which sum was refused by the plaintiff. Judgment was rendered by the justice in favor of the plaintiff for the sum tendered and the costs then accrued, and against the plaintiff for all subsequent costs. The plaintiff appealed to the circuit court of Andrew county; a change of venue was taken to Buchanan county, and on a trial *de novo* in the circuit court of the last named county, there was a verdict and judgment for the defendant.

The judgment of the circuit court is clearly erroneous. On the face of the record, the plaintiff was entitled to a 1. SET-OFF: TENDER. judgment for the amount tendered and the costs of the suit to the date of the tender. Notwithstanding the defendant's tender, the plaintiff had a right to contest the validity of the defendant's set-off, and the jury should have been instructed that the defendant's tender admitted the justness of the plaintiff's demand, and that plaintiff was entitled to recover the amount thereof, less such sum, if any, as they might find to be due from him to the defendant, on the defendant's set-off. After the tender made in connection with the set-off pleaded, the defendant should not have been permitted to introduce testimony for the purpose of reducing the amount of the plaintiff's demand. *Mahan v. Waters*, 60 Mo. 167, 171.

There was testimony tending to show that the sum which the defendant claimed to have loaned to the plaintiff, was loaned in "poker chips" at a game of 2. MONEY LOANED FOR GAMBLING. chance, and upon this evidence the plaintiff asked the court to instruct the jury, "that if they believed from the evidence that the amount in defendant's set-off had been loaned plaintiff in a game of chance in which both were engaged at the time, and for the purpose of being used in betting on said game, and defendant knew the purpose of the loan, the jury will allow him nothing on

account of said set-off." Section 1548 of the Revised Statutes makes it a misdemeanor in any one to loan or furnish any money or property to any other person to be bet upon any gambling device whatever, if the money or property loaned be so used. The instruction asked is faulty in that it does not contain the qualification contained in the statute that the money was "so used," and it was, therefore, properly refused.

The court also refused the following instruction asked by the plaintiff: "that upon the record the defendant had admitted plaintiff's claim to be just and due, and the service charged of the value claimed by plaintiff, and that would allow plaintiff the full amount thereof." This instruction should have been given in lieu of the first instruction given by the court of its own motion, which is as follows:

I. If the jury believe from the evidence that the plaintiff about the time charged in the account sued upon, rendered to defendant, or to any member of his family, services as a physician, at the request of defendant, then the jury should allow plaintiff therefor such sum as was reasonable, at the time and place at which said services were rendered.

The court also gave the following instruction of its own motion:

2. If the jury believe from the evidence that defendant, about the month of November, 1877, loaned plaintiff the sum of \$1.50, and that at the time at which the loan was made it was not known to defendant that plaintiff had borrowed the same for the purpose of using said money in betting at a game of chance, then defendant should be allowed for the sum so loaned unless the sum was re-paid, or accounted for by plaintiff, and the winning of any sum by plaintiff from defendant in a game of chance cannot be considered by the jury as constituting a discharge or settlement of the sum so loaned.

Under this instruction, if the defendant knew that the

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money loaned by him to the plaintiff, was borrowed for the purpose of betting the same on a game of chance, he could not recover it back, although it may not have been used in betting. This instruction, therefore, contains the same vice found in the first instruction asked by the plaintiff. It is also faulty because there is no testimony upon which to base the last clause, viz., "the winning of any sum by plaintiff from defendant in a game of chance," etc.

For the reasons given, the judgment of the circuit court will be reversed and the cause remanded.

Counsel state that the costs in this case have already reached the sum of \$400. It is no part of the duty of this court to lecture litigants, and we, therefore, refrain from characterizing this litigation as it deserves to be characterized; but we will express the hope that controversies like this will soon cease to find their way to a court of last resort, already overburdened with business of vast importance to the citizen and to the public. All concur.

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CAMPBELL V. THE MISSOURI PACIFIC RAILWAY COMPANY, *Appellant*.

1. **Double Damage Act: KILLING STOCK: PLEADING.** In an action under the statute against a railroad company for double damages for killing stock, the complaint need not specifically allege that the injury was occasioned by the failure to fence or to maintain cattle-guards, or that the injury was not within the limits of an incorporated city or town. It is sufficient if these facts may be inferred from the allegations of the complaint.
2. **Jurisdiction: JUSTICE'S COURT: APPEAL.** Jurisdiction of a justice is a question of fact, which cannot be examined on appeal when the record does not show a proper filing of the bill of exceptions.
3. **Bill of Exceptions: EVIDENCE OF FILING.** The file mark of the clerk indorsed on the bill and copied into the record, is the only proper evidence of the filing of the bill of exceptions in vacation.

*Appeal from Cole Circuit Court.*—HON. E. L. EDWARDS,  
Judge.

**AFFIRMED.**

*T. J. Portis and Smith & Krauthoff* for appellant.

*M. J. Leaming and Edwards & Davison* for respondent.

WINSLOW, C.—This is an action under the double damage section of the statutes, originally commenced before a justice of the peace of Marion township, Cole county, Missouri. There was a judgment by default before the justice, from which the defendant, after the usual manner, duly perfected an appeal to the circuit court. In the circuit court, after various objections to the complaint and the introduction of testimony had been made by defendant, and overruled by the court, there was a trial by jury, which resulted in a verdict for plaintiff for \$30; which verdict was doubled by the court, and a judgment for \$60 rendered against defendant; to reverse which defendant brings the case here by appeal. The following is a copy of the complaint:

“Plaintiff states that defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri; that on the — day of August, 1879, at Marion township, in Cole county, Missouri, at a point on the track of defendant’s railroad where the same passes along and adjoining an inclosed and cultivated field, and not a private or public crossing of said road, the defendant by its agents, servants and employes, running its locomotive and train of cars, ran the same upon and over the cow of plaintiff, of the value of \$45, and thereby killed said cow; that the defendant failed and neglected to erect and maintain good and sufficient fences at the sides of its road at the point where said cow got upon the track of said road and was killed, and failed and neglected to keep, con-



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struct and maintain a cattle-guard at a certain crossing of defendant's railroad at said inclosed and cultivated field in said Marion township, suitable and sufficient to prevent cattle, mules and all other animals from getting on the railroad of defendant." Prayer for double damages.

The first objection alleged against this complaint is, that it does not state that the injuries complained of were caused by the failure to construct sufficient fences and cattle-guards.

It is alleged in the complaint that the accident occurred at a point on the road where the same "passes along and adjoining an inclosed and cultivated field, and not a private or public crossing of said road;" also, that defendant "failed and neglected to erect and maintain good and sufficient fences at the sides of its road at the point where said cow got upon the track and was killed, and failed and neglected to keep, construct and maintain a cattle-guard at a certain crossing of defendant's railroad at said inclosed and cultivated field."

It is the settled doctrine of the cases cited below, that the complaint need not specifically allege that the injury **1. DOUBLE DAMAGE** was occasioned by the failure to fence or **ACT; killing stock:** maintain cattle-guards; but that it will be **pleading.** sufficient if it appear, inferentially, from the allegations of the complaint. The allegations of this complaint are as full and specific as many that have been sustained in the cases alluded to. It is alleged that the cow was killed at a point where the company was bound to fence or maintain a cattle-guard, and that she "got upon the track of said road and was killed," at that point; and that the company had failed to erect and maintain a cattle-guard where its road entered said field. It may be very clearly inferred from these statements that the cow was killed by reason of these failures. This complaint is informal, it is true. The better practice would be for attorneys, in drawing these complaints, to take necessary pains and insert the few negative averments required by the statute; and for attorneys

on the other side to pay closer attention to the merits than these questionable technicalities. This statute is penal in its character, and the companies are entitled to a more definite statement under it than is usual in ordinary cases before justices. The following cases fully sustain this complaint on the point just considered: *Edwards v. Railroad Co.*, 74 Mo. 117; *Williams v. Railroad Co.*, 74 Mo. 453; *Scott v. Railroad Co.*, 75 Mo. 136; *Bowen v. Railroad Co.*, 75 Mo. 426; *Belcher v. Railroad Co.*, 75 Mo. 515; *Terry v. Railroad Co.*, 77 Mo. 254; *Kronski v. Railroad Co.*, 77 Mo. 362.

The second objection is, that the complaint does not state that the cow went upon the track at a point not within the limits of an incorporated city or town. This objection is disposed of by the rule announced in the cases above cited. It is alleged that the injuries occurred at or in an inclosed and cultivated field, or at a cattle-guard at a railroad entrance of said field. Any ordinary mind would infer from these facts that the injury could not have occurred within the limits of an incorporated city or town. In *Rowland v. Railroad Co.*, 73 Mo. 619, the complaint, as may be seen by a casual reading, contains none of the negative averments required by the statute, and it could not be inferred where the injury occurred. *Schulte v. Railroad Co.*, 76 Mo. 324, was intended to decide no more than is contained in the general rule already adverted to. The complaint is not set forth in the opinion; but an examination of the original record will show that it is no stronger in its negative averments than the *Rowland case*. Hence, both cases form exceptions to the general rule.

These are all the questions that arise on the record proper; all other questions depending entirely upon the facts. The only serious question is as to whether the evidence shows that the stock was killed in the justice's township. Of course, if it was not, there was no jurisdiction. This is purely a question of fact; and this question, as well as all other questions, we are precluded from examining, because the record shows

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no proper filing and authenticating the bill of exceptions.

The first entry of record on this subject is as follows: "Now come the parties plaintiff and defendant herein by attorneys, and by consent of all the parties and leave of the court, the defendant is given thirty days after the expiration of this term of the court in which to prepare and present to plaintiff's counsel, have signed and file its bill of exceptions in this cause." The following is the succeeding order in the case, and is all there is to show the filing of the bill: "And afterward, to-wit, in vacation, and on Thursday, June 24th, 1880, the following proceedings were had in said cause, to-wit: (omitting caption.) Bill of exceptions signed, sealed, allowed and filed, and made part of the record herein, which said bill of exceptions is in the words and figures following, to-wit."

The record fails to show any file mark of the clerk indorsed upon the bill of exceptions and copied in the record, which is the only proper evidence for the filing of the bill. He has no legal right to open court and make an order upon the records of the court unless expressly authorized by statute; and all such records are nullities; hence, there is nothing on the face of this record to show that the bill of exceptions was ever filed and authenticated in this case. The rulings of this court, published and unpublished, are so numerous and positive on these questions as to preclude any further discussion. *Carter v. Prior*, ante, p. 222; *Prior v. Kiso*, decided at the present term.

For the reasons stated above, the judgment should be affirmed. All concur.

3. BILL OF EXCEPTIONS: evidence of filing.

THE STATE V. WAGNER, *Appellant*.

1. **Murder by Poisoning.** A homicide by administering poison, with intention of mischief and for an unlawful purpose, knowing it to be dangerous to human life, although without intent to kill, is murder at common law, and under the statute murder in the first degree.
2. **Murder: REVERSIBLE ERROR.** Under section 1654 of the Revised Statutes of 1879, a person found guilty of murder in the second degree shall be punished according to the verdict, although the evidence shows him to be guilty of murder in the first degree. In such a case the granting of an instruction for murder in the second degree is not reversible error. See *State v. Alexander*, 66 Mo. 148.
3. **Criminal Law: RIGHT OF ACCUSED TO MEET ADVERSE WITNESSES: WAIVER.** Where the defendant in a criminal prosecution, in order to avoid a continuance, consents that a written statement presented by the prosecuting attorney as containing the testimony of absent witnesses shall be read to the jury as and for their testimony, he thereby waives his constitutional right to meet the witnesses against him face to face.

*Appeal from Jackson Criminal Court.*—HON. H. P. WHITE,  
Judge.

**AFFIRMED.**

*Haire & Kenyon* for appellant.

*D. H. McIntyre*, Attorney General, and *Wm. H. Wallace* for the State.

HOUGH, C. J.—The defendant was indicted for murder in the first degree, and was convicted of murder in the second degree, and sentenced to imprisonment in the penitentiary for ten years.

He is charged in the indictment with having at divers times prior to and on the 24th day of November, 1881, willfully, deliberately, premeditatedly and of his malice aforethought, administered a certain poison called laudanum to one Norman J. Bauder, designing and intending him, the said Bauder, thereby to kill and murder, from the effects of

which said poison said Bauder died on the 24th day of November, 1881. There was testimony tending to show that the defendant administered the laudanum to deceased from time to time, not for the purpose of killing him, but for the purpose of stupifying his faculties and weakening his intellect so that he might obtain possession of certain money and property which the deceased had; and there was also testimony tending to show that the deceased was afflicted with diarrhœa, and that the laudanum was administered to him by the defendant for the purpose of checking the disease. It also appears that the defendant administered an unusually large dose to the deceased on the day of his death, from the effects of which there is testimony tending to show he died. The court instructed the jury as to the law of murder in the first degree, murder in the second degree, and manslaughter in the fourth degree, as follows:

1. If you find from the evidence that the defendant, A. J. Wagner, at the county of Jackson, in the State of Missouri, at any time previous to the filing of the indictment in this cause, intending and contriving to kill the deceased, Norman J. Bauder, did willfully, deliberately, premeditatedly and of his malice aforethought, kill said Norman J. Bauder by giving to said Bauder a quantity of poison called laudanum, or by giving said Bauder divers quantities of said poison at divers times, then you will find the defendant guilty of murder in the first degree.

2. If you find from the evidence that the defendant, A. J. Wagner, at the county of Jackson in the State of Missouri, at any time within three years next before the filing of the indictment in this cause, in pursuance of a design on his part to produce, increase or prolong such a state of stupor or sickness on the part of deceased, Norman J. Bauder, as would enable him, the defendant, to accomplish any unlawful purpose with reference to said Bauder, did willfully, premeditatedly and of his malice aforethought administer to him, the said Bauder, any quantity or quantities of a poison called laudanum, knowing that to do so

was wrong and dangerous to life, and should you further find that in consequence of such laudanum, so administered, for said purpose by defendant, the said Bauder died, then in such case, the law presumes such laudanum was administered by said Wagner with intent to kill said Bauder, and also that such killing was done with malice aforethought, and the jury must find the defendant guilty of murder in the second degree and assess his punishment at imprisonment in the State penitentiary for a term not less than ten years.

3. If you find from the evidence that defendant brought about the death of deceased by giving him laudanum, and yet not in such a manner and with such intent as to render him guilty of murder in the first or second degree, under the foregoing instructions, yet if you find that defendant was attempting to treat deceased for some disease with which deceased was afflicted, and in such treatment carelessly and recklessly so administered laudanum to deceased, that he was guilty of culpable negligence in producing the death of deceased thereby, then you will find defendant guilty of manslaughter in the fourth degree, and assess his punishment at imprisonment in the penitentiary for two years, or by imprisonment in the county jail not less than six months, or by a fine not less than \$500, or by both a fine not less than \$100 and imprisonment in the county jail not less than three months.

The giving of the second instruction has been assigned as error. The question presented for our determination by

1. MURDER BY POISONING. this instruction and the argument of counsel is whether, on the facts stated therein, the defendant is guilty of murder in the first or second degree. The statute provides that "every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or mayhem, shall be deemed murder in the first



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degree." R. S., § 1232. "All other kinds of murder at common law, not herein declared to be manslaughter, or justifiable or excusable homicide, shall be deemed murder in the second degree." R. S., § 1233. It has been repeatedly decided by this court that our statute dividing murder into two degrees is a statute of classification and not of definition, and that no homicide, therefore, can be murder either in the first or second degree which was not murder at the common law. *State v. Shock*, 68 Mo. 552; *State v. Curtis*, 70 Mo. 598; *State v. Robinson*, 73 Mo. 306. The question then arises whether, when a homicide is committed by the administration of poison without an intent to kill, but in order to accomplish some unlawful act other than the felonies specified in the statute, and the person administering the same knows it to be dangerous to life, such homicide is murder at common law. If it be murder at common law, then as the murder is by poison it is necessarily murder in the first degree. A homicide by poison is not necessarily murder at common law. Wharton on Hom., § 92. Poison may be carefully and innocently administered for a lawful purpose, and yet produce death, in which case no crime will have been committed. So, also, a homicide committed by poison heedlessly or incautiously administered for no unlawful purpose will amount at most only to manslaughter. But where poison is knowingly administered with intention of mischief, and to accomplish some unlawful purpose, if death ensue it will be murder, although death was not intended. The principles here announced find support in a remarkably clear and satisfactory opinion by Judge McKinney in the case of *Ann v. State*, 11 Hump. 159, *vide* also *State v. Wells*, 61 Iowa 100; *s. c.*, 17 Cent. L. J. 389. Under this view of the law the second instruction was erroneous. On the facts stated in this instruction, which the jury by their verdict seem to have found to be true, the defendant is guilty of murder in the first degree, a homicide by poison, which is murder at common law, being under the statute, as has been stated, murder in the first degree.

But this error of the court will not warrant a reversal of the judgment. Section 1654 of the Revised Statutes, declares that: "Upon indictment for any offense consisting of different degrees as prescribed by this law, the jury may find the accused not guilty of the offense charged in the indictment, and may find him guilty of any degree of such offense inferior to that charged in the indictment, or of an attempt to commit such offense, or any degree thereof; and any person found guilty of murder in the second degree, or of any degree of manslaughter, shall be punished according to the verdict of the jury, although the evidence in the case shows him to be guilty of a higher degree of homicide." This statute has been declared by this court to be a constitutional enactment, (*State v. Hopper*, 71 Mo. 425,) and the verdict of the jury, therefore, cannot be disturbed for the error committed by the court in giving the second instruction.

It is further urged by the defendant's counsel that the court erred in permitting the written statement of absent witnesses, prepared by the prosecuting attorney on his application for a continuance for the State, to be read to the jury, although the defendant insisted on going to trial and consented that such statements might be used as and for the testimony of such witnesses. This assignment of error is based upon section 22 of the bill of rights, which provides that in criminal prosecutions the accused shall have the right "to meet the witnesses against him face to face," and upon the further ground that the defendant cannot waive this constitutional right. This precise question has been directly passed upon by the supreme court of Iowa in the case of the *State v. Polson*, 29 Iowa 133, under a constitutional provision similar to ours, and the right of the defendant to waive his personal privilege to be confronted by the witnesses against him is distinctly affirmed both upon principle and authority, and we approve the views there announced.

2. MURDER: revers-  
ible error.

3. CRIMINAL LAW:  
right of accused to  
meet adverse wit-  
nesses: waiver.

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Canole v. Hurt.

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Perceiving no error in the record before us which will warrant a reversal, the judgment of the criminal court of Jackson county will be affirmed. The other judges concur.

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CANOLE V. HURT *et al.*, *Plaintiffs in Error.*

1. **Homestead:** DEATH OF WIDOW LEAVING MINOR CHILDREN. Under the homestead act of 1865, the right of the minor children to hold and enjoy the estate, is not affected by the death of the mother.
2. **Case in Judgment:** CHILDREN BY SECOND HUSBAND. Upon the death of J a homestead was set off to M, his widow, and R, their child, a minor. M afterward married H, and died leaving a minor son by H. *Held*, that the death of M did not interrupt the homestead right of R as long as he remained a minor. But on R attaining his majority, he and the son by H would inherit the estate from M as tenants in common.

*Error to Howard Circuit Court.*—HON. G. W. BURCKHARTT,  
Judge.

AFFIRMED.

*Herndon & Herndon* for plaintiff in error.

*S. C. Major* for defendant in error.

PHILIPS, C.—This is an action of ejectment, begun in 1879, by Robert Canole, a minor, by guardian, to recover of defendants a tract of land in Howard county containing 28 65-100 acres, more or less. Ouster laid on the 20th day of August, 1878. The answer tendered the general issue.

The case was tried on the following agreed statement of facts: That John Canole, at the time of his death, was seized in fee and possessed of the tract of land described in plaintiff's petition; that said John Canole left a widow, Mary Canole, and a minor child, Robert Canole, the plaintiff;

that Charles B. Canole is the guardian of said Robert Canole; that the defendant George W. Hurt is an infant, of whom Mark Jackman is the guardian; that said Mary Canole, widow, after the death of her husband, John Canole, married — Todd, who left her; and the said Mary, without obtaining a divorce from said Todd, married defendant, Henry Hurt; and defendant George W. Hurt is her only child by said marriage with Henry Hurt; that the said land was duly set off to Mary Canole and her minor child Robert Canole, as a homestead under the provisions of the statute, and while said Mary was the widow of John Canole.

The order of the court setting out such homestead was here read in evidence, in words and figures following, to-wit:

“Mary Canole against David Pipes, administrator of the estate of John Canole, deceased. In the Howard county court, February 9th, 1870. David Peeler, John Walker and William H. Settle, commissioners, appointed at the last term of this court to set out to plaintiff a homestead, present their report, and it appearing to the court that the tract of land described in the petition and in the said report filed, was valued by said commissioners at \$860, and that sum is less than the value of a homestead allowed by law, and that said commissioners have set out the whole tract as a homestead for said plaintiff and her child, Robert Lee Canole, according to the provisions of the statute in such cases, it is, therefore, ordered by the court that the report of said commissioners be, and the same is approved and confirmed and ordered to be recorded, and the tract of land described therein set out to Mary Canole and Robert Lee Canole as a homestead, according to the statute aforesaid.”

It was further admitted that the defendants were in possession of the land in controversy at the commencement of this suit, and are now in possession, and that the value of the monthly rents is \$5. There was no other evidence.

The court found the issues for the plaintiff, and the defendant brings the case here on error.

The question for discussion arising on the agreed statement of facts has not been directly decided in this State, though the principle involved has, in effect, been settled. The homestead claim represented arose under the statute of 1865. The fifth section of the homestead act reads as follows:

"If any such housekeeper or head of a family shall die, leaving a widow or any minor children, his homestead, to the value aforesaid, shall pass to and vest in such widow or children, or if there be both, to such widow and children, without being subject to the payment of the debts of the deceased, unless legally charged thereon in his lifetime; and such widow and children, respectively, shall take the same estate therein of which the deceased died seized; provided, that such children shall, by force of this chapter, only have an interest in such homestead, until they shall attain their majority, and the probate court having jurisdiction of the estate of such deceased housekeeper or head of a family, shall, when necessary, appoint three commissioners to set out such homestead to the person or persons entitled thereto."

From this section one thing is clear to my mind, and that is, the legislature did not intend to secure the privileges and benefits of the homestead exemption and estate to any other person or persons than the widow and minor children of the "head of the family" who died seized of such homestead. The manifest object was to preserve to the head of the family during his life the enjoyment of the home property as a means of shelter and protection, as also a means of better securing the unity of the family. Its further purpose was, upon his death, to devolve the estate upon his widow and minor children just as he held it, and for the same beneficent end—that of keeping his widow and dependent children together by affording to them a common shelter and a common source of subsistence.

No other children than his minor children are admitted to the homestead as such. No child of the wife, by marriage anterior or subsequent to her coverture with the owner of the estate, has any right or claim to enter into the homestead and share it with his children, so long as they are minors. Any other construction would thwart the spirit and intent of the statute, and let in aliens to the head of the family to share with his offspring the home which the legislature declared shall be enjoyed by his widow in perpetuity and his offspring during minority.

True, it is that under this statute the widow took in fee, and at her death the fee title would descend to her heirs and not to her husband's. *Skouten v. Wood*, 57 Mo. 380. So that if at the time of her death there had been no minor child of the husband, no doubt but her children, whether of lawful or unlawful wedlock, would take the estate, in fee, as of the mother, as tenants in common.

But where there is a minor child, as in this case, of the father from whom comes the homestead, while the fee title is in the widow, the minor child is entitled to hold with her during the minority, and neither she nor those claiming under her, can oust or resist the right of possession of such minor.

Judge Napton, in *Skouten v. Wood*, *supra*, while the point was not directly involved, nevertheless expressed his view of this question as follows: "Supposing her death to occur before the minor children (where there are any) attain majority, it would be a serious question as to where the title goes; but I suppose it would go to the surviving minor children and on their majority to the heirs of the deceased." By the expression "to the heirs of the deceased" he meant, evidently, the heirs of the deceased widow. In that case the court held, that as the section in the statute of 1865, under consideration, was copied from the homestead law of the state of Vermont, the legislature adopting it are supposed to have been familiar with the construction placed upon the act by the supreme judicial department of that



state, and by a well recognized rule of interpretation such construction came with and was, in effect, adopted by our legislature when they re-enacted the statute. In *Keys v. Hill*, 30 Vt. 760, decided in 1858, long anterior to the adoption of the homestead law now in question, the supreme court of that state determined the character and quality of the estate taken by the widow and heirs, and the right of one to hold it in severalty. The proposition was sought to be established in that case that the widow and children held as tenants in common, with all the incidents and rights which under the general law of real property inhere to such estate. Under the construction contended for in that case by the one party, as here, the homestead estate could be cut into as many "distinct equal fragments" as there were children, and taken by each in severalty, "though the widow might have no other place or means of shelter, habitation or support." This the court held was not to be maintained. But it said: "We think the clear design of the law is to continue the homestead entire, as the home of the widow and children constituting the family at the decease of the husband and housekeeper or head of the family, and that no right of the children becomes operative to sever or divert such homestead from full enjoyment and occupancy as the family home, so long as the widow, or widow and children, see fit to continue it as such family home. In other words, we think the homestead continues to stand in the same relation to the family of the deceased for the purpose of a home and support, upon and after his decease, as it did before and up to the time of his decease." As the correlative of this construction it must follow that as the children cannot oust nor sever, as against the widow, neither can the widow, while living, hold to the exclusion of the children nor in severalty.

The practical operation of an effort to enforce the rule contended for by appellant will demonstrate its invalidity. It will not, I presume, be contended by the learned counsel for plaintiff in error, that the death of the mother termi-

nated, or in any degree lessened the estate of the minor under the homestead law. This child is equally interested with the after-born child in the fee estate inherited from the mother. So if there be a right of admission to the immediate possession of the premises by the after-born child, to what share or interest is he entitled? It cannot be an equal share with the first child, for he holds a homestead interest in addition to the undivided half interest with the later child in the fee under the mother. As the homestead interest cannot be severed, but must be held and enjoyed in common as an entire estate, if the last child could maintain ejectment it could only be to the extent of being let in to hold, as of the entirety, with the beneficiary of the homestead, when it has no right whatever in the property under the homestead law.

The construction of this act must, therefore, be that the right to hold and enjoy the estate was in nowise interrupted by the death of the widow. The first child, during its minority, holds not by inheritance but by virtue of the homestead law. And as the absolute fee, which the widow took, was burdened with the homestead interest and right of the first child, and as the after-born child is not claiming, nor indeed can claim, any right under the homestead act as such, but solely by the law of descent from the mother, it takes an interest in the fee, but burdened with the paramount right to the possession of the first child during its minority. When the first child shall have attained its majority the homestead estate will be at an end, and both children will then, and not before, as heirs of the common mother, take from her the estate in fee as tenants in common.

It follows that the conclusion reached by the circuit court was for the right party, and its judgment is affirmed. All concur.

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STONE V. THE TRAVELERS INSURANCE COMPANY, *Plaintiff in Error.*

1. **Action against Corporation: IRREGULAR SUMMONS: AMENDMENT.** In an action against a corporation the writ commanded the officer to summon "the proper officer of" the corporation to appear. Pending a motion to quash on the ground that the writ did not require the corporation but only its officer to appear, the court granted leave to amend by striking out the words here quoted. *Held*, that this was proper; and although it did not certainly appear that the amendment had actually been made, this court would treat it as if it had been.
2. **Foreign Insurance Companies: SERVICE OF PROCESS ON THEM: "STATE AGENT."** In an action against a foreign insurance company the sheriff returned that he had served the summons on H. P., "state agent" of the company. *Held*, that the words "state agent" sufficiently designated H. P. as the person appointed by the company under section 6013, Revised Statutes 1879, for the purpose of receiving service of process in actions against the company.
3. ———: TO BE SUED, WHERE. Suits against foreign insurance companies are not required to be brought in the county in which the agent appointed under section 6013, Revised Statutes 1879, to receive service of process, resides. They may be brought in any county in the State; and if the agent lives in another county, the writ is to be directed to the sheriff of the latter county.

*Appeal from Linn Court of Common Pleas.*—HON. THOS. WHITAKER, Judge.

AFFIRMED.

*Dyer, Lee & Ellis* for plaintiff in error.

*Lithgow & Elliott* for defendant in error.

HOUGH, C. J.—The defendant, a non-resident insurance company, incorporated under the laws of the state of Connecticut, was sued by the plaintiff in the common pleas court of Linn county on the 12th day of April, 1880. The writ of summons was directed to the sheriff of St. Louis city, commanding him to summon the "proper officer of the Travelers Insurance Company of Hartford, Connecti-

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cut, to appear," etc., before said common pleas court. This writ was returned executed by the sheriff of St. Louis city by delivering a copy of the petition and writ "to Horace Power, state agent of the Travelers Insurance Company of Hartford, Connecticut, the within named defendant."

The defendant appeared specially and moved to quash the writ and return, for the following reasons: (1) Because the writ is directed to the sheriff of the city of St. Louis. (2) Because it appears on the face of the writ that it does not require the defendant to appear, but requires some officer of the company to appear. (3) Because it appears by the writ of summons that defendant is a foreign corporation organized under the laws of Connecticut, and must be sued in the county in which its agent authorized to accept service is found, and it cannot be served by and through an officer of said company. (4) Because the writ and return of the sheriff are void. (5) Because the return is insufficient.

Pending this discussion of the motion, on application of plaintiff, the court made an order allowing the writ to be amended by striking out of the mandate thereof, the words "the proper officer of," thus leaving a command to summon the defendant; and although the writ is copied into the transcript before us as it was originally issued, as the writ was not void and the amendment was permissible, we will regard it as having been made. *Jarbee v. Steamboat*, 19 Mo. 141. It is perhaps fairly inferable from the recitals in the bill of exceptions that the amendment was actually made.

The return of the officer that he had, in the manner stated, served "Horace Power, state agent of the Travelers Insurance Company of Hartford, Connecticut, the within named defendant," sufficiently designates said Power as the person appointed by the defendant under section 6013 of the Revised Statutes, upon whom process might be

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ular summons:  
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ANCE COMPANIES:  
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on them: "state  
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served in suits instituted against said company. The person required to be appointed under said section, is designated therein both as an agent and an attorney. The return would have been more precise if it had described Power as the state agent of the defendant for the service of process or to receive service of process, but that he was such agent may be fairly implied from the use of the words "state agent." We are of opinion that the return of the officer is, in this particular, sufficient.

The principal question presented by the record is whether in a suit instituted in Linn county, against a foreign insurance company as sole defendant, process can be issued to and served by the sheriff of the city of St. Louis on the agent appointed by the company under section 6013 of the Revised Statutes to receive service of process in this State. The section referred to provides that any foreign insurance company desiring to do business in this State, "shall first file with the Superintendent of the Insurance Department a written instrument or power of attorney duly signed and sealed, appointing and authorizing some person who shall be a resident of this State, to acknowledge or receive service of process, and upon whom process may be served for and in behalf of such company in all proceedings that may be instituted against such company in any court of this State, or any court of the United States in this State, and consenting that service of process upon any agent or attorney appointed under the provisions of this section shall be taken and held to be as valid as if served upon the company, according to the laws of this or any other state; \* \* Service of process as aforesaid, issued by any such court as aforesaid, upon such attorney appointed by the company \* \* shall be valid and binding, and be deemed personal service upon such company, so long as it shall have any policies or liabilities outstanding in this State."

Under the foregoing provisions of our insurance law relating to foreign insurance companies, service may be made

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upon the agent thereby required to be appointed, in any suit instituted against such company in any court of the State. In the case of *Baile v. Equitable Fire Ins. Co.*, 68 Mo. 617, it was held that the mode of suing a foreign insurance company not domesticated here, by reason of having its chief office or place of business in this State, provided by the foregoing section of the insurance law, is exclusive of all other modes of service. The defendant being a non-resident of the State was subject to suit in any county in this State, (R. S., § 3481,) and could be personally served in the manner pointed out by the section under consideration.

The sheriff of Linn county has no general power to serve process beyond the limits of his county, and there is no special provision in cases like the present authorizing the sheriff to serve process in any other county. As the section quoted authorizes process issued by any court in the State to be served upon the agent or attorney of the foreign insurance company appointed to receive service, such agent may, of course, be served wherever found in this State, and as there is no provision in the statute authorizing the sheriff of the county where the suit is brought to serve process out of his county, there is necessarily an implied power in the court where the suit is brought to issue process to the sheriff of any county in the State where the agent of the foreign insurance company may be found. We are of opinion, therefore, that the court had jurisdiction of the defendant, and the judgment of the common pleas court, which was for the plaintiff, will be affirmed. All the judges concur.



BRANDENBURGER V. EASLEY, *Appellant*.

1. **Justices' Courts: SUMMONS.** Section 2858 of the Revised Statutes of 1879, provides that the summons, issued by a justice of the peace, shall require the defendant to appear not more than seventy-four days from its date, and shall also state the nature of the suit and the sum demanded; *Held*, that a summons dated June 10th, 1879, requiring defendant to appear before the justice on the 23rd day of June, 1880, and containing no statement of the nature of the suit nor of the sum demanded, was a nullity.
2. **This Court cannot act upon a conjecture** that a date appearing in the record is erroneously given.

*Appeal from Linn Circuit Court.*—HON. G. D. BURGESS,  
Judge.

REVERSED.

*A. W. Mullins* for appellant.

*E. R. Stephens* for respondent.

HENRY, J.—This suit originated in a justice's court in Linn county. The writ of summons issued by the justice, is as follows: "State of Missouri, to the constable of Locust Creek township, in the county of Linn, State of Missouri, greeting: We command you to summon George W. Easley to appear before the undersigned, one of the justices of the peace of Locust Creek township, in Linn county aforesaid, on the 23rd day of June, 1880, at ten o'clock in the forenoon, at his office in said township, to answer the complaint of S. Brandenburger and A. Lowenstein, of the firm of S. Brandenburger & Co. Given under my hand, this 10th day of June, 1879. W. P. Menefee, justice of the peace." On which summons a return was made as follows: "I hereby certify that I have executed the within writ by delivering a true copy of the within writ to the within named George W. Easley, the 11th day of June, 1880, in Locust Creek township, Linn county,

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Missouri. Marion Boles, constable." Judgment by default was rendered against defendant by the justice on June 23rd, 1880. And on July 2nd, 1880, defendant, by attorney, appeared for the purposes of the motion only and filed his motion to set aside the judgment. This was overruled by the justice and defendant appealed.

In the circuit court the defendant filed his motion to dismiss the suit, which motion is as follows: "Now at this day comes the said defendant and appearing for that purpose only, moves the court to dismiss this suit for the reasons following, to-wit: Because the summons served in this case does not state the nature of the suit or the sum demanded, as required by law." Which motion was overruled by the court and defendant excepted. At the same term of said court and on December 10th, 1880, judgment was rendered against defendant for the sum of \$81.05, by default. And on the same day defendant filed his motion to set aside the judgment by default and grant a new trial, for the reasons following: (1) Because the court improperly overruled the motion to dismiss the case made by defendant. (2) Because the judgment was rendered against the defendant without his having such notice thereof as was required by law. (3) Because said summons was not served upon the defendant by any officer authorized by law. (4) Because no summons was served on defendant. The court overruled the motion for new trial and defendant excepted:

Section 2858, R. S. 1879, provides that the summons shall command the constable to summon the defendant to appear before the justice at the time and place named therein, "not less than ten nor more than seventy-four days from the date thereof, to answer the complaint of the plaintiff, stating also the nature of the suit and the sum demanded." It does not appear from the summons whether the suit was on a note or account, or on what cause of action. If on an instrument of writing, purporting to have been executed by the defend-

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summons.

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ant, and the debt or damages claimed may be ascertained from the instrument, the law dispenses with a statement of the cause of action, preliminary to the issuance of the writ, but requires that the writing shall be filed with the justice. § 2852. The statement filed with the justice is not before us, nor does it appear, except in plaintiff's statement of the case in this court that the suit was on a promissory note. Section 2858 requires that, in the summons, the nature of the suit shall be stated. Because the summons required the defendant to appear more than a year after its date, and contained no statement of the nature of the suit, it was a nullity.

There is no suggestion that the summons was, in fact issued on the 10th day of June, 1880, and that it was a clerical error to give it the date it bears. 2. **THIS COURT.** While we might conjecture that this was so, yet we cannot, on mere conjecture, regard the 10th day of June, 1880, as the true date at which the summons was issued.

The motion to dismiss should have been sustained, and the judgment is reversed and the suit dismissed. All concur.

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THE CITY OF KANSAS V. JOHNSON, *Appellant*.

1. **Justice's Courts: STATEMENT.** In an action before a justice of the peace the statement is sufficient if it advises the defendant of the nature of the demand against him.
2. **Merchant's tax under Kansas City Charter.** Under the charter of Kansas City a merchant's liability for the payment of taxes on his goods and wares for a given year, does not depend upon the fact of his being a merchant during the fiscal year beginning on the third Monday of April of that year, but is made to depend upon the fact whether on the 1st day of January of that year, and at any time within three months before such 1st day of January he had on hand as a merchant in said city goods, wares and merchandise.

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3. ———: **NOT A TAX FOR PRIVILEGE.** The tax imposed upon a merchant by the charter of Kansas City is not for exercising the privilege of selling goods, but is a tax imposed upon his goods and wares as a merchant, or in other words, a personal tax on the goods of a merchant as distinguished from the personal tax of others.
4. **Pleading Matter of Law.** A pleading is not defective for not alleging a matter of law. An averment that a tax was "duly levied" is equivalent to pleading the substance of the ordinance under which it was levied, and is sufficient to authorize the reception of the ordinance in evidence.
5. **Constitutional Law: TAXING POWER.** Section 3 of article 10 of the constitution, which declares that all taxes shall be levied by general laws was intended to restrict the power of the legislature in passing laws for the levy of taxes to the passage of general laws as distinguished from local and special laws, and it did not repeal charter provisions authorizing the levy of taxes.
6. **Attorney's Fee.** An attorney's fee of ten per cent is expressly authorized under the charter of Kansas City in suits for the collection of taxes.
7. **Judgment for more than Demanded.** The amount of tax due at the time of beginning suit being stated, the law fixes the interest and costs to be added when judgment is rendered. Hence, it is no objection to a judgment for taxes that it is for a greater amount than is sued for, the amount being in such case a matter of law and not of fact.
8. **Payment of other Tax no Defense.** Payment of taxes on a different stock of goods as a merchant during a given fiscal year, is no defense to an action for the tax of a merchant legally imposed upon a stock of wares and merchandise which he had been engaged in selling as a merchant on the 1st day of January of that year, and for three months preceding that day.

*Appeal from Jackson Special Law and Equity Court.*—HON.  
R. E. COWAN, Judge.

AFFIRMED.

*J. B. F. Cates and Milton Campbell* for appellant.

*R. H. Field and D. S. Twitchell* for respondent.

NORTON, J.—This suit was instituted before a justice of the peace upon the following statement, viz: "Plaintiff

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states that on the first day of January, 1878, and for more than three months prior thereto, the defendant, Jervis Johnson, was carrying on business as a merchant in the City of Kansas; that the said city, by its mayor and common council, duly assessed and levied on the wares and merchandise of said defendant:

A Merchant's License Tax, for the year 1878, of.....	\$234 00
Interest and penalty on said tax.....	18 72
Attorney's fee for Counselor.....	25 27

Total.....	\$277 99
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Which said tax, interest, penalty and costs have not been paid, and for which plaintiff asks judgment.

S. P. TWISS, City Counselor,

Plaintiff's Attorney."

On the trial before the justice plaintiff obtained judgment, from which defendant appealed to the special law and equity court, where plaintiff again obtained judgment, from which defendant has appealed to this court. The following proceedings were had at the trial, to-wit:

Plaintiff offered to read in evidence from the personal tax-book of 1878, of Kansas City, as follows:

Name, Jervis Johnson.

Location, 543 Main Street.

Business, Queensware Dealer.

Cash value of goods as returned by assessor.....	\$9,000
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General tax per centum.....	\$ 90
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Per cent for payment of Bonds and Coupons.....	144
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Total.....	\$234
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Defendant objected to the admission of this evidence on the ground that no cause of action is stated against defendant, it not appearing (a) that plaintiff has capacity to sue; (b) nor that defendant was a merchant in the fiscal year 1878; (c) nor that any right to levy a gross tax of \$234 existed; (d) nor that a levy of interest, penalty or at-

torney's fees on license tax was legal; (e) nor that an ordinance levying such tax was pleaded, nor that a suit for a license tax is given. (2) And that said evidence is irrelevant. The court overruled these objections, and admitted said evidence, to which defendant excepted.

Plaintiff then offered in evidence an ordinance of the City of Kansas, approved April 16th, 1878, entitled, "An ordinance to levy taxes for the fiscal year, beginning on the 15th day of April, 1878." Said ordinance levies 10 mills on the dollar as a general tax;  $13\frac{1}{2}$  mills on the dollar for payment of bonds, etc., and  $2\frac{1}{2}$  mills on the dollar for a sinking fund; and levies said taxes amounting to 26 mills, "on the merchants named in the list made and returned by the city assessor for the fiscal year beginning on the third Monday of April, 1878." And said ordinance closes as follows: "License taxes shall be collected in the same manner and at the same time as taxes on the other personal property; and all laws and ordinances governing as to collection of taxes on personal property generally shall apply to the collection of taxes on merchants."

Defendant objected to the admission of this ordinance in evidence: (1) Because it was not pleaded. (2) Because the last sentence is not included in the title. (3) Because the law does not permit such mode of collection. (4) Because said last sentence is uncertain, impossible and beyond the power of the council. The court overruled these objections and admitted said ordinance in evidence, and defendant excepted. Plaintiff offered no further evidence, but rested.

Defendant put in evidence: (1) His tax receipt and license as a merchant from plaintiff for the fiscal year 1877, ending April 15th, 1878. (2) His tax receipt and license as a merchant delivered him by plaintiff for the fiscal year 1878, ending April, 1879. (3) It was admitted on the trial by both parties: (a) That defendant was a merchant and owned the wares and merchandise covered by the first of said licenses during 1877, and up to March 1st, 1878, at



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which date he sold them to a party who forthwith took them from this State; that defendant did not own said goods during the year 1878 after the 1st of March, 1878. (b) That the second of the above licenses and tax receipts covered a new and different stock of goods, procured by defendant during the fiscal year 1878. (c) That the license tax here sued for was levied under the charter of Kansas City, approved March, 1875, and that said city never organized under the general laws relating to cities, approved April 21st, 1877. (4) The revised ordinance of the City of Kansas, approved October 14th, 1861, defining a merchant, prescribing a punishment for dealing as a merchant without a license, requiring a bond to pay "all taxes due on his license," and that the city attorney shall collect the licenses unpaid by any process known to the law. This was all the evidence.

We are of opinion that the trial court did not err in overruling defendant's objection to the introduction in evidence either of the personal tax-book, or the ordinance entitled "An ordinance to levy taxes for the fiscal year beginning on the 15th day of April, 1878." It will be observed that this suit was commenced before a justice of the peace, and in such cases the statement filed is sufficient if it advises the defendant of the nature of the demand against him. It is manifest from the statement, that plaintiff's demand against defendant is for unpaid taxes duly assessed, as alleged, on the wares and merchandise of said defendant, as a merchant.

We do not think it was necessary to aver in the statement that defendant was a merchant during the fiscal year of 1878. This, we think, is manifest from sections 5, 8 and 9, pages 219, 220, Acts 1875. Section 5 provides that every person owning or holding property subject to taxation for municipal purposes on the 1st day of January of any calendar year after 1875, including all property purchased on that day, shall be liable for taxes thereon for the fiscal year beginning on the third

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statements.

2. MERCHANT'S TAX  
UNDER KANSAS CITY  
CHARTER.

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Monday of April next thereafter. Section 8 provides that the assessor shall, at least ten days before the 1st day of January in each year, give public notice \* \* that all merchants doing business in the city, are required (on or before the 15th day of February next) to furnish to him at his office, a true statement, verified by the oath or affidavit of such merchant or his agent, of the highest amount in value of all goods, wares and merchandise owned or kept on hand for sale by such merchant at any time within three months before such 1st day of January. Section 9 makes it the duty of the assessor between the 1st day of January and the 15th day of March of each year to return to the council a full and complete assessment of all property \*

\* and a list of all merchants doing business in said city, with the cash value of the highest amount of goods, wares and merchandise owned or kept on hand by each, for sale, at any time within three months before the 1st day of January of each year. It will be perceived that under the above charter provisions defendant's liability for the payment of taxes on his goods and wares, was not dependent upon the fact of his being a merchant during the fiscal year of 1878 beginning on the third Monday of April, 1878, but is made to depend upon the fact whether on the 1st day of January, 1878, and at any time within three months before such 1st day of January, 1878, he had on hand as a merchant goods, wares and merchandise.

We do not regard this as a suit to recover a tax imposed upon the defendant for exercising the privilege of selling goods, wares and merchandise as a merchant, but to recover a tax imposed upon his goods and wares as a merchant,

1. —: not a tax or in other words, to recover a personal tax for privilege. on the goods of a merchant as distinguished

from the personal tax of others. So regarding it, the statement in question meets the requirements of section 76, page 241, Acts of 1875, which provides that in suits for the collection of taxes on personal property, it shall be sufficient to state the amount of tax, interest and costs and penalty

claimed, the year or years for which it was levied, the owner of the personal property, and that the tax has not been paid.

Neither is the statement deficient in not alleging that the mayor and council had a right to levy the tax. Whether

**4. PLEADING MATTER  
OF LAW.**

they had the right was a matter of law and not of fact, and hence it was unnecessary to allege the existence of the right. That the right existed is abundantly shown by sections 31, 1 and 3, Laws of 1875, pages 217, 218, 219. The averment contained in the statement that the tax was duly levied, in effect pleaded the substance of the ordinance, and that is sufficient to authorize its reception in evidence.

It is also insisted that the power conferred by the charter on the City of Kansas, through its officers, to levy taxes,

**5. CONSTITUTIONAL  
LAW; TAXING POWER.**

was abrogated by section 3, article 10 of the constitution, which declares that all taxes shall be levied by general law. This section was intended to restrict the power of the legislature in passing laws for the levy of taxes to the passage of general laws as distinguished from local and special laws, and it does not repeal by implication charter provisions authorizing the levy of taxes. This construction of the above section is, by analogy, sustained by the following decisions: *State ex rel. v. Macon Co. Ct.*, 41 Mo. 453; *Pacific R. R. Co. v. Cass Co.*, 53 Mo. 17; *State ex rel. v. McDonald*, 38 Mo. 529; *State ex rel. v. Shepherd*, 74 Mo. 310.

It is also objected that the allowance of an attorney's fee is unauthorized. By reference to sections 40 and 83 of

**6. ATTORNEY'S FEE.**

article 6 of plaintiff's charter, Laws of 1875, it will be seen that an attorney's fee of ten per cent is expressly authorized in suits for the collection of taxes.

We fail to perceive any force in the objection made, that the judgment is for a greater amount than is sued for.

**7. JUDGMENT FOR  
MORE THAN DE-  
MANDED.**

The amount of the tax due at the time of the institution of the suit being stated, the law fixes the penalty to be added by way of interest and

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costs when judgment is rendered. The class of cases to which we have been cited by defendant's counsel were suits for the recovery of damages where the amount of damages was ascertained as a matter of fact and not by law.

The fact that defendant carried on business as a merchant during the fiscal year of 1878 and paid taxes on a different stock of goods cannot avail him as a defense, for the reason that his liability to pay the tax sued for, became fixed from the fact that such tax was legally imposed upon a stock of wares and merchandise which he had been engaged in selling as a merchant on the 1st day of January, 1878, and for three months preceding that day.

It is unnecessary to review the instructions given and refused by the trial court, inasmuch as the one given on the part of the plaintiff conformed to the views herein expressed, and those asked for by the defendant and refused were antagonistic to them. The judgment is, therefore, affirmed. All concur.

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**RANSON, Plaintiff in Error, v. SHEEHAN.**

- 1 **Mechanic's Lien**; DESCRIPTION OF LAND: CONSTRUCTION OF "TRUE DESCRIPTION:" "SO NEAR AS TO IDENTIFY THE SAME." To entitle a contractor to a mechanic's lien, the statute, (Wag. Stat., p. 909, § 5,) requires him to file "a true description of the property, or so near as to identify the same, upon which the lien is intended to apply." To maintain a lien on a building situated on a certain acre of ground, fifteen acres were described by their exterior boundary. Held, that this was not "a true description of the property or so near as to identify the same" within the statute.
2. **Failure of Description**: NOT CURED BY SUBSEQUENT SURVEY. This failure of description could not be cured by the plaintiff's joining with another lienor, in going, after the suit was brought, upon the land, surveying it, and setting out the exact acre in an amended petition—at least, not as against a third party purchasing the premises. *Oster v. Rabeneau*, 46 Mo. 595, distinguished.

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3. **Lien failing on Land—not Maintainable on Building.** A mechanic's lien cannot be maintained against the building where the lien against the land has failed through an inaccurate description.

*Error to Buchanan Circuit Court.*—HON. JOSEPH P. GRUBB,  
Judge.

AFFIRMED.

*Graham G. Lacy and Vinton Pike* for plaintiff in error.

*Franklin Porter* for defendant in error.

PHILIPS, C.—This is an action to enforce a mechanic's lien; and the matter to be determined depends on the sufficiency of the petition. The original petition was filed August 19, 1875. On September 4, 1876, plaintiff filed an amended petition against Edward Sheehan and his wife Frances, and Charles B. Wilkinson. The amended petition alleged that Edward and Frances were the owners of fifteen and one-half acres of ground described in the petition, and that said Edward had, in 1875, for himself and on account of his wife, and with her full knowledge and consent, and for her immediate use, enjoyment and benefit, entered into a contract with plaintiff to erect, build and complete the brick work of a brick addition, and to furnish red brick and sand and mortar in making other improvements to the one-story brick dwelling with stone basement, owned by said Edward and Frances Sheehan, and situated on their land described in said petition, for which plaintiff was to be paid as set forth in said petition, and that pursuant to said agreement plaintiff furnished material and did the work in making said addition and improvements, all of which amounted to \$511.70, upon which plaintiff had been paid the sum of \$75, leaving a balance due plaintiff of \$436.70; that all of said work was done and materials furnished between April 1 and May 8, 1875, and that the last item of plaintiff's claim was furnished on May 8, 1875. The petition avers that plaintiff

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duly performed all things on his part as required by his said agreement, and further alleges "that on August 18, 1875, plaintiff filed in the office of the circuit court of Buchanan county a just and true account of the demand due to him for the work done and materials furnished, as aforesaid, after all just credits were given, which was claimed to be a lien upon the building and improvements, for and on account of which said work was done and said materials were furnished, and also a true description of the property, so that the land on which the lien was intended to apply could and can be identified, and also setting forth the name of the owners of the property so subject to said lien, which account and statement was duly verified by the plaintiff who thereby claimed and intended to enforce a lien for the amount so due him as aforesaid against the above-mentioned building and improvements, and the land on which they are situated to the extent of one acre, which account and claim of lien are now on file in said office. Plaintiff avers that on May 7, 1875 the said Edward Sheehan and Frances A. Sheehan did, by warranty deed, convey the real estate above described to the defendant Charles B. Wilkinson, which conveyance was executed after the work aforesaid had been nearly completed, and the day before the last of said materials were furnished, as aforesaid, by plaintiff, of which conveyance plaintiff had no knowledge until after said May 8, 1875. Plaintiff also avers that the defendants, each and all, have failed and refused to designate or set apart the acre of ground subject to plaintiff's lien as aforesaid; that one Jeremiah Irwin also claims a lien against the said building and improvements and one acre of ground upon which they are situated, for work and labor done on said building and improvements, and is prosecuting his suit in this court to establish his said lien and to obtain a special judgment according to the statute in such case made and provided; that plaintiff knows of no other person or persons holding or claiming a mechanic's lien against said property; that plaintiff and said Irwin have caused to



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be measured, designated and defined, one acre of ground out of the land above described, and upon which said building is situated," which said acre of land, so measured, defined and designated, the petition set out in full. It then averred that upon this acre of ground and building and improvements before mentioned, the plaintiff claims a lien for the amount aforesaid for the work and material furnished; that the account accrued and became due and payable on May 8th, 1875, when payment was demanded and refused.

The defendants failing to answer said petition, their default was duly entered, and at the January term, 1877, the cause coming on to be heard upon an inquiry of damages, the plaintiff introduced evidence proving that he had performed the work and furnished the material charged in his petition upon the building described in the petition, and that said building is the only one on said fifteen-acre tract, and that the work and materials were reasonably worth the amount charged in the petition. Upon this evidence and upon the statements of the petition not denied, plaintiff submitted the cause.

Thereupon the defendant read in evidence the account and statement filed in the clerk's office, upon which plaintiff claimed his mechanic's lien which is as follows:

ST. JOSEPH, Mo., August 18, 1875.

Edward Sheehan and Frances A. Sheehan,

To William Z. Ranson, Dr.,

(Itemized Statement)

To balance.....\$436 70

After setting forth the itemized account under the above heading, the statement follows that it is a just and true account of the demand due plaintiff, after all just credits are given, for materials furnished and work done in erecting an addition to the one-story brick dwelling house with one basement situated on the fifteen and one-half acre tract of land, which is described as in the petition, and that

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the work was done and materials furnished between a day in April and May 8, 1875, the last labor being performed on the last named date; that Frances and Edward were together the owners of said real estate, and that said Edward for himself and for his wife, contracted for said improvements, and concludes: "And the said William Z. Ranson intends that this shall be a lien on said building and improvements above mentioned, and on the above described real estate to the extent of one acre, and files the same as a lien thereon." Said statement was duly verified and filed in the office of the circuit clerk of Buchanan county, August 17th, 1875.

The court rendered judgment upon the evidence against the plaintiff as to Frances A. Sheehan and Charles B. Wilkinson, and refused to adjudge or foreclose a mechanic's lien in plaintiff's favor for the claim stated in plaintiff's petition, and refused to render judgment against said Frances or said Wilkinson, or either of them, whereto plaintiff excepted, and brings the case here on writ of error.

Was this petition sufficient to entitle the plaintiff to the lien claimed on the land? Section 1, page 907, Wagner's Statutes, gave such contractor "for  
 1. MECHANIC'S LIEN :  
 description of land:  
 construction of:  
 "true description:"  
 "so near as to identify the same."  
 his work or labor done, or materials furnished, a lien upon said building, and upon the land on which the same is situated to the extent of one acre." Section 5, page 909, provides, *inter alia*, that to entitle such contractor to the lien he shall "file with the clerk of the circuit court a just and true account of the demand due him which is to be a lien upon such building, and a true description of the property, or so near as to identify the same, upon which the lien is intended to apply," etc. It is apparent from the description which the petition alleges to have been filed with the clerk, that it was impracticable, if not impossible, to determine from it the acre of ground to be impressed with the intended lien. Fifteen acres are described by their exterior boundary. This is no description of any one acre; nor is it "so near as to identify the

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same." This precise question is decided in *Williams v. Porter*, 51 Mo. 441, and *Wright v. Beardsley*, 69 Mo. 548.

The plaintiff sought below to remedy this objection by joining with another alleged lienor in going, after suit

2. FAILURE OF DESCRIPTION: not cured by subsequent survey.

was instituted, on the land and by survey definitely ascertaining the acre on which the house stood, and then setting out this acre in his amended petition. The supposed authority, I presume, for this procedure was based on the suggestion of Currier, J., in *Oster v. Rabeneau*, 46 Mo. 595. That was a case of a lien on a single town lot, which embraced a fraction over an acre, and it was held that the excessive description of the fractional part ought not, as between the lienor and the owner of the lot for whom the work was done, to vitiate the lien where the true limit of the lot to be affected was so easily ascertainable by a commissioner or other agent of the court. But in such case the ministerial officer or agent is designated by the court and the suggestion is no authority for the lienor, after suit brought, constituting himself surveyor, and making the admeasurement. Whilst upholding with the most liberal construction the beneficent provisions of this law, wisely designed as it was for the protection of the men whose materials and labor have been applied to the enhancement of another's property, yet where, as in the case at bar, the rights of a third party, a subsequent purchaser, are concerned, a stricter rule of construction is maintained. Wagner, J., in *De Witt v. Smith*, 63 Mo. 263, 266, 267, while asserting with spirit the rights of the lienor, observes: "In reference to the case now under consideration it must be borne in mind that there is no contest between independent outside parties. Had a third person purchased the property without any other notice on the record, he might have been deceived by the misdescription, and it would not be notice to him."

In the case now under review, Wilkinson bought from Sheehan and his wife, the owners, before the plaintiff filed any lien at all, and certainly to affect him with the

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lien subsequently filed there should be an approximate conformity to the letter of the statute. The petition in this case does not even aver that he had any notice when he bought. No such averment would have been necessary had the plaintiff, though subsequently filing his lien, complied with the law. It must, therefore, result that the plaintiff, under the petition, was not entitled to have his lien enforced against the land or any part of it.

**3. LIEN FAILING ON  
LAND—NOT MAIN-  
TAINABLE ON  
BUILDING.**

The plaintiff contends, however, that enough was shown to entitle him at least to maintain his lien against the building in question. And this presents for determination the question as to whether a mechanic's lien will attach, under our statute, against the building alone where the lienor has failed to affect the acre of land with his lien? If this were a question of first impression, and my opinion were of controlling force, I would be inclined to hold the affirmative of this proposition, on the grounds that the first section of the mechanic's lien law says the contractor and material man "shall have a lien upon such building and upon the land." The building being the principal subject of the lien, that which in fact is the occasion of the lien, I view the acre of land as an additional security to the creditor lienor; and because the creditor does not see fit to take all the security which the law accords him it is difficult to understand why he should lose the whole, where he has filed his lien on the principal thing—the building. The debtor who has failed to pay for the work, it seems to me, ought not to complain that his creditor did not ask for the lien on the land.

But in *Williams v. Porter*, 51 Mo. 441, the Supreme Court of this state held otherwise, and asserted that where the mechanic had failed, as in the case now under review to obtain his lien on the acre of ground by vague description, "no lien was created." This construction the present Supreme Court is in favor of maintaining. The lien on the building is made to depend on the lien on the acre

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of ground to prevent difficulties and embarrassments which would inevitably arise out of a construction that would permit one man to sell and own the building, while another owned the ground on which the building stood. The only case provided by statute for the removal of the building from the land by the purchaser under the mechanic's lien, being in the instance of prior encumbrances and mortgages, and in case of leaseholds, the inference is that the legislature did not contemplate any other contingency under which the building might be separated from the land; and as without this right of separation the lien on the building alone would be of little avail, such separate lien was not in the legislative mind in enacting the statute. It follows under this view of the law that the judgment of the circuit court must be affirmed. All the commissioners concur.

SHERWOOD, J., dissented.

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NEWMAN V. BIGGS *et al.*, Appellants.

**Appeal.** This case was stricken from the docket for want of an order in the record allowing the appeal.

*Appeal from Howard Circuit Court.*—HON. G. H. BURCKHARTT, Judge.

STRICKEN FROM THE DOCKET.

O. T. Rouse for appellants.

A. J. Herndon for respondent.

MARTIN, C.—There is no order in the record of this case granting an appeal. In what purports to be a bill of exceptions there are recitals to the effect that an appeal had been granted, but it contains no copy of any such order. There is no entry in the transcript of the filing of any bill

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of exceptions—nothing to make it a part of the record; so that these imperfect recitals of an appeal cannot be accepted as evidence of the fact. The case is stricken from the docket. All concur

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BURNETT V. McCLUEY, *Appellant*.

1. **Deed: ERASURE: PRESUMPTION.** The law presumes an erasure in a deed to have been made before its execution, and imposes the burden of proof on him who asserts the contrary.
2. ———: ———. An erasure or alteration in the description of one of several tracts of land embraced in a deed, made after delivery of a deed, will not affect its validity as a conveyance of the other tracts.
3. ———: SEAL. Where a deed declares that the grantors have affixed their seals, but no seal appears opposite the names of one or more of them, it will be presumed that they adopted those opposite the other names.
4. **Married Woman's Deed: ACKNOWLEDGMENT.** A certificate of acknowledgment to a married woman's deed, made in 1875; *Held*, to be defective because it failed to state that she was made acquainted with the contents of the deed.
5. **Sheriff's Deed: ATTACHMENT: EVIDENCE.** A sheriff's deed in attachment proceedings taken without the statutory affidavit is void; and where the record shows no finding that the writ of attachment was duly issued, the court files may be read in evidence to determine whether there was such an affidavit or not, and if none appear, then parol evidence is admissible on the one hand to show that some of the files have been lost or destroyed, and on the other that files alleged to be lost or destroyed, never existed.
6. **Deed: DESCRIPTION: CALL FOR QUANTITY.** A deed described the property conveyed as the "north half of the southwest quarter the southwest quarter of section 6." *Held*, that it should be construed to convey the north half of the southwest quarter of the southwest quarter of section 6, especially as the call for quantity supported this construction.



*Appeal from Dade Circuit Court.*—HON. J. D. PARKINSON,  
Judge.

REVERSED.

The testimony of Nathaniel Bray on behalf of plaintiff was as follows: I did know of the suit of Bank against Ferguson and Stephens. I was employed by Stephens to defend the case. My impression is I examined the papers before the court convened; I know I did early in the return term of the suit. McAfee and Phelps and I examined the papers at that time; they represented Ferguson and Stephens. I found that Stephens' property was not attached and no service on him, and I told him (Stephens) to keep out of Dade county. McAfee and Phelps, or one of them, and I talked about it, that there was no affidavit and bond; then I told Estes he had better dismiss my clients, but he went on and took judgment against both, and when the record was read next morning I found a regular attachment judgment entered up. My client was not attached, but the judgment was against both Ferguson and Stephens. I then examined the record and knew all about it, that is the entry read the next morning. I objected to the entry because no attachment, nor service, on my client. Phelps and McAfee objected to judgment against their client because no affidavit or bond, and Ferguson not personally served. Perhaps McAfee filed a motion to that effect, I can't say; I appeared only as a friend of the court. The next judgment was a general one, and was entered on pages 579 and 580. Joseph Estes was plaintiff's attorney; he left here in 1868; I next learned where he was of his brother who was here; I have not seen him since 1868. When here he took a good deal of tea, at times very brilliant and at others very morose; he went away very strangely; he transacted his business here very loosely. I have corresponded with him since he left; I have had a number of talks with defendant about the purchase of this

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land; the Fergusons and myself owned the land together. There was an understanding between the Fergusons and myself not to sell unless we were both agreed. The Fergusons lived in Arkansas and defendant had been there to see them about buying their land. He told me that he could not trade for the land himself, but that he had got Burnett to trade them a piece of land Burnett had in Arkansas, and McCluey was to pay \$800 or \$900 for his lands in, say six months, and he, McCluey, wanted to buy my interest in the lands.

On cross-examination he further testified; I informed defendant say one and a half or two years ago, of Estes' whereabouts. It was before Jo Estes' deposition was taken the first time in this case. After Burnett bought out the heirs, he, Burnett, denied my title to one heir's share, and hence, I didn't own half. We, McCluey and I, were wrangling with Burnett about his title, and I think it was after this suit was commenced I did secure Estes' first deposition in this case, which deposition I understand to have been suppressed. That deposition was to prove from Estes whether an attachment, affidavit and bond was filed in the suit of the Bank against Ferguson and Stephens. I got the deposition and paid my money for it, \$25.00, and have not got it back.

Q. Did you not write a letter to Estes inquiring of him if he did not file affidavit and bond for an attachment in the Bank suit against Ferguson and Stephens, and in that letter did you not use the following words, to-wit: It is a purely jurisdictional question? Ans. I may have used those words; I would not say that I did not. A letter being handed to witness he further testified as follows, to-wit: I wrote this letter; I might have used the words, "It is a purely jurisdictional question." I am not sure but I did act in a double capacity; perhaps I agreed to assist McCluey against Burnett. The time McCluey came to me at Carthage was the day I entered into a written contract as to his purchase of my Ferguson lands. The controversy

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between McCluey and me against Burnett, was not long after McCluey's contract with me. I counseled McCluey to hold possession of the land against Burnett. When Burnett conceded I owned one half I tried to get them to settle it and divide the lands between them.

Redirect: I don't know whether Estes, when he took the judgment, had the affidavit or bond in his hands; there were then no such papers in the roll; I did not see Estes have them; I could not say anything about that.

C. B. McAfee testified: I knew of the Bank case against Ferguson and Stephens; I examined the papers before any judgment was taken; I didn't find any affidavit for attachment, but found affidavit of non-residence and affidavit to petition, such as was used in order of publication cases in those days; also a writ of attachment was there, when a judgment was taken in the case; I don't recollect the reading of the record, but when judgment was entered at reading, or soon after, I noticed it was a special judgment against Ferguson's land. I called the judge's attention to it, and said I had been employed by Ferguson, and having made the examination, I had made no appearance to the suit; and asked if I might, as a friend of the court, appear for the purpose of moving to set aside the judgment. He readily granted it, and I prepared such a motion, I think, to quash the writ of attachment, but of that I am not certain. When I had got so far along and motion prepared and handed to the judge, I understood the judgment was set aside. I handed the motion to the clerk. Judge Price told Estes to prepare such a judgment as he wanted and hand it to Capt. McAfee, and he did so and I was satisfied. I have no recollection of examining the record afterward. I have no recollection of ever seeing the judgment on record, or ever seeing the record afterward. The judgment Estes prepared was a general judgment on an order of publication and no attachment. My reason for changing the judgment was that there was no affidavit and bond, and I presume I put that in my motion, and I sup-

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posed the judgment was set aside, and I didn't pay so much attention as I might, because it was so easy a going thing. I had the roll. I can't tell whether Estes had any affidavit or bond. I don't think he had, because that was the very question.

Q. In what order and condition were the court papers kept in the office of the clerk of this court in 1865 and thereabouts? Ans. In a very loose and careless order.

The deposition of Joseph Estes, on behalf of defendant, was as follows: I was the attorney of the Merchant's Bank of St. Louis, for Dade county, and as such I brought an attachment suit for said bank against John N. Ferguson, Marshal G. Stephens and others, on a bill of exchange for \$400, in the circuit court of Dade county, Missouri, returnable to the fall term, 1865. I drew and filed the petition, bond and affidavit in said suit. These papers were drawn in the usual statutory form. I made the affidavit for said bank in said suit, which affidavit, among other things, charged the defendants, Ferguson and Stephens, with having absented themselves from their usual places of abode, so that the ordinary service of law could not be had upon them—or words to that effect copied from the statutory form. I drew and signed said affidavit, and was sworn to the same by the clerk of the circuit court of Dade county. The bond was signed by myself as attorney for the bank and by R. S. Jacobs of Greenfield, Dade county, and was approved by said clerk. When I had filed the petition, bond and affidavit the clerk of the circuit court of Dade county issued a writ of attachment against said defendants, which writ was directed to the sheriff of Dade county, and was by him levied upon the real estate of Ferguson, situate in said county. There was no defense made to the suit; and as attorney for plaintiff, I asked and obtained a judgment in attachment against the defendant in said suit. At the succeeding term of the court, after the judgment was rendered, the said real estate of said Fergu-

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son was sold by the sheriff of Dade county to satisfy said judgment, and Robert McCluey became the purchaser.

Q. Who was clerk of the circuit court of Dade county when you brought this suit? A. Benjamin Appleby was clerk, and Nelson McDowell, deputy.

Q. Were the petition, bond and affidavit fastened together when you filed them? A. I think not. It was my custom to draw my attachment suits on separate pieces of paper and hand them to the clerk to be fastened together.

Q. Have you ever seen the papers since you filed them? A. Only once that I remember; I had the petition, bond, affidavit and order of publication in my hands at the time I took the judgment; I then returned them to the clerk, and have not seen them since.

Q. Did you ever bring any other suits against the defendants, Ferguson and Stephens? A. I did not.

Q. Did you ever ask the court to set aside the judgment in said suit and grant the plaintiff a general judgment. A. I did not. I demanded and obtained a judgment in attachment, and I depended in this case (as in all others) on the clerk entering up the judgment in proper form. I never knew until quite recently—that is to say since the year 1877—that any other entry but the original entry of a judgment in attachment had been made in this suit.

Q. Did the Bank instruct you to bring suit by attachment? A. The Bank ordered me to bring all her suits by attachment, where defendants were non-residents.

*N. Gibbs* for appellant.

*J. C. Cravens* for respondent.

HOUGH, C. J.—This is an action of ejectment for an undivided half of the south half of the northwest quarter and the north half of the southwest quarter, and the southwest

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quarter of the southwest quarter of section 6, township 32, range 28, and the east half of the southeast quarter, and the south half of the northeast quarter of section 1, township 32, range 29, in the county of Dade. John N. Ferguson is the common source of title. Plaintiff claims title under a deed from the heirs of Ferguson, containing the following description: "Southwest quarter of section No. ten (10), township No. thirty-one (31), range twenty-eight (28); also an undivided half of the following, to-wit: South half of the northwest quarter, and north half of the southwest quarter - the southwest quarter of section 6, township 32 of range 28, and also the east half of the southeast quarter and south half of the northeast quarter of section 1, township 32 of range 29, containing 340 acres, more or less."

The acknowledgment of this deed is as follows:

STATE OF ARKANSAS, }  
County of Benton, } ss.

On the 19th day of January, 1875, before John Black, clerk of the circuit court of Benton county, Arkansas, personally appeared Charlotte E. Ferguson, William H. Ferguson, B. V. Ferguson, Robert K. Ferguson, Raphael W. Hansard, Sarah C. Hansard, his wife, John K. Putnam and Alice C. Putnam, his wife, of the county of Benton and state aforesaid, to me well known as the persons whose names appear as grantors in the foregoing deed of conveyance, and stated that they had executed the same for the consideration and purposes therein set forth, and I do hereby so certify, and I further certify that upon an examination of Sarah C. Hansard, wife of R. W. Hansard, Alice C. Putnam, wife of J. K. Putnam, separate and apart from their said husbands, acknowledged that they had of their own free will signed and sealed the relinquishment of dower for the purposes herein contained and set forth, without compulsion or undue influence of their said husbands.

In testimony whereof, I have hereunto set my



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[SEAL.] hand and affixed the seal of said court, at office in Bentonville, Benton county, Arkansas, this 19th day of January, 1875.

JOHN BLACK, Clerk.

The defendant objected to the introduction of this deed in evidence for the reason that there had been a material alteration therein since its delivery to plaintiff, and since it was recorded, and also because the certificate of acknowledgment of Sarah C. Hansard and Alice C. Putnam does not conform to the requirements of the statute and is insufficient. The alteration complained of consisted in the erasure of the word "of" from the description above quoted, where the hyphen appears between the word "quarter" and the word "the;" said erasure being visible on inspection. A certified copy of said deed was introduced in evidence by the defendant which contained the word "of" at the place above designated by the hyphen. Oral testimony was introduced by the plaintiff, tending to show that said alteration was not made after the delivery of the deed.

The defendant claimed title under a sheriff's deed made in pursuance of a sale in a certain attachment proceeding against said John N. Ferguson, the common source of title, and one Marshall G. Stephens. The plaintiff introduced in evidence the record and original papers in said attachment proceeding, from which it appeared that the defendant Ferguson was a non-resident of the state and did not appear to the action. An affidavit of the non-residence of the defendants appeared among the files, but no affidavit for an attachment. Oral testimony was introduced by the plaintiff, tending to show that no affidavit for attachment was ever made in said cause, and similar testimony was introduced by the defendant tending to show that an affidavit for attachment had been made in said cause and was lost.

There was testimony tending to show that the defendant told the plaintiff that he had lost the land in contro-

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versy in a suit with one Bray, and that he advised the plaintiff to purchase the title from the Ferguson heirs, as he himself could not effect a trade with them, and that plaintiff did so purchase as advised, but the judgment of the court, as will be seen from an instruction given at the instance of the defendant, was not based upon this testimony.

The court gave the following declarations of law at the request of the plaintiff:

1. That it is admitted in testimony that John N. Ferguson is the common source of title to the land described in plaintiff's petition; that John N. Ferguson died in the year 1868, and plaintiff's grantors Charlotte E. Ferguson, the wife of John N. Ferguson deceased, and Arthur Ferguson, B. V. Ferguson, Alice Putnam, Sarah Hansard, William N. Ferguson, R. K. Ferguson are the children and heirs at law of said John N. Ferguson deceased.

2. That although the court may believe from inspection of the original deed from the Ferguson heirs to John Burnett, that there has been an erasure in said deed, the law presumes the erasure was made before the execution of the deed, and the burden of proof is on defendant to show, by competent testimony, that the erasure was made since the execution of the deed.

4. That the judgment in the case of the Merchants Bank of St. Louis against John N. Ferguson and Marshall G. Stephens upon which the deed offered in evidence by defendant rests, is void, and said deed passes no title.

5. That if the court believes from the testimony, that defendant, previous to the purchase of the title of the Ferguson heirs by plaintiff, made statements to plaintiff inconsistent with his (defendant's) title, or induced or advised plaintiff to buy the land in controversy, of the Ferguson heirs, then defendant is estopped from setting up any title, and plaintiff must recover.

6. That if the court believes from the testimony, defendant McCluey advised plaintiff to trade his, plaintiff's,

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farm in Arkansas to the Ferguson heirs for the land in controversy, and that the plaintiff did so trade, believing that the defendant had no claim to said land from defendant's statements, advice and conduct, then defendant is estopped from setting any claim to said land.

7. The court declares the law to be, that if the court shall believe from the testimony that defendant McCluey made such statements to plaintiff as would lead plaintiff to believe he, McCluey, had given up his claim to the land in controversy, and plaintiff was induced to purchase said land, by representations to plaintiff by defendant McCluey, that he plaintiff, could make money by buying or trading for said land, and that plaintiff did so buy, or trade for said land, relying on said statements, then defendant is estopped from setting up any claim to the same.

The court, on motion of defendant, gave the following declarations of law:

2. In an ejectment suit where there is in issue the validity of a sheriff's sale of lands under a final judgment rendered by a court of original and general jurisdiction, and the rights of an innocent purchaser are at stake, the judgment under and by which said sale was had, cannot be impeached or proven void by oral testimony; such judgment can only be proven void in such a suit by the roll and record itself.

3. Oral testimony, to avoid a final judgment of a court of original and general jurisdiction, can only be used in a direct proceeding to set aside such judgment, and then only when the rights of innocent purchasers have not intervened.

4. A final judgment of a court of original and general jurisdiction, when used, or called in question in a collateral proceeding imports, and is, absolute verity, and can only be contradicted and invalidated by the roll and record itself.

5. A person claiming title to lands does not forfeit his right by attempting to buy in a conflicting claim.

6. The fact of the defendant's going to Arkansas to buy out the claim of Ferguson's heirs to the land in controversy, while he was in possession of those lands, and defending an ejectment suit then pending in this court against him for those lands, which suit was brought for or by his heirs, and his acts, in attempting to so buy, do not forfeit or prejudice his right to defend or assert the right, title and claim which he had prior to his attempt to so buy out said heirs, against another person, who thereafter, and while such suit was pending, bought the interest of said heirs in those lands, and took their quit-claim deed only to such lands.

7. The doctrine of estoppel can only be invoked by a person whose conduct in the whole transaction shows the utmost good faith.

11. The testimony in this case is not sufficient to establish an estoppel on behalf of plaintiff.

13. The two instruments in writing read in evidence by plaintiff, and under which he claims title, only purporting to be deeds of remise, release and quit-claim, and plaintiff being the pretended purchaser in said instruments, and the defendant being then in possession, plaintiff cannot claim to be an innocent purchaser, for a valuable consideration, and without notice of defendant's rights or claims.

14. It being admitted by the parties to this suit, that at the time plaintiff claims to have purchased the lands in controversy from the widow and heirs of John N. Ferguson, deceased, defendant was in possession of said lands, and an action of ejectment was then pending in this court, against him for said lands, in which ejectment suit said heirs were plaintiffs and were claiming three-fifths of the said lands, and the deeds which plaintiff received from said heirs, and under which he claims, being but deeds of remise, release and quit-claim, plaintiff took under said quit-claim deed only what said heirs could lawfully remise, release and quit-claim, and plaintiff did not thereby acquire any right superior to the right which they had.

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19. The instrument read in evidence by plaintiff, and purporting to be a quit-claim deed, and purporting to have been executed by Charlotte E. Ferguson, B. V. Ferguson, Alice C. Putnam, and J. K. Putnam, her husband, Sarah C. Hansard, and Raphael W. Hansard, her husband, William H. Ferguson and Antha Ferguson, his wife, and Robert K. Ferguson to plaintiff, John Burnett, on the 29th day of January, 1877, and purporting to remise, release and quit-claim to plaintiff the lands in controversy, having been executed after the commencement of this suit, will not sustain plaintiff's right to recover in this action, and plaintiff cannot base his right of recovery on this instrument.

24. In order to recover in an action of ejectment, the plaintiff must show title in himself to the lands in question at the institution of the suit.

27. An estoppel is a purely equitable defense, and plaintiff must do equity to defendant before he can claim equity.

28. A deed only takes effect from its delivery.

It is unnecessary to transcribe here the declarations of law asked by the defendant and refused by the court, as all the material errors committed by the court are indicated in this opinion. There was a finding and judgment for the plaintiff for the land described in the petition.

In the second instruction given at the instance of the plaintiff, the court correctly declared the law in regard

to the erasure in the deed under which the plaintiff claims title. *McCormick v.*

*Fitzmorris*, 39 Mo. 24. And it is manifest from the judgment rendered, that the court found from the testimony before it, that the erasure in question was made before the delivery of the deed. As there is testimony to support the finding of the court, this court will not undertake to weigh the evidence.

And even though the circuit court had found that the erasure had been made after delivery, and that such erasure

was not a spoliation, but had been fraud-

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ulently made by the grantee, still, under the decision of this court in *Woods v. Hilderbrand*, 46 Mo. 284, the deed would have been admissible as evidence of title to the tracts thereby conveyed, in the description of which no alteration had occurred. The rule in regard to the alteration of deeds differs from that applicable to negotiable paper.

The fact that no seal or scrawl was affixed to the names of three of the parties to said deed, does not render it in-  
 3. — : seal. operative as to them. The instrument purports to be sealed, and declares that the parties thereto have subscribed their names and affixed their seals. In such case, it has been held by this court, that where any seal has been affixed, such seal or seals, will be presumed to have been adopted by the parties to whose names no seal is affixed. *Lunsford v. La Motte Lead Co.*, 54 Mo. 426.

The certificate of acknowledgment, however, is defective as to Sarah C. Hansard and Alice C. Putnam, part  
 4. MARRIED WOMAN'S DEED: acknowledgment. owners in fee of the land conveyed, in that it does not state that they were made acquainted with the contents of the deed; nor is there any equivalent statement in said certificate. On the contrary, the certificate recites that on an examination separate and apart from their husbands, they acknowledged that they had of their own free will signed and sealed the relinquishment of their dower in the premises conveyed. If it distinctly appeared that the parties named had been made acquainted with the contents of the deed, the statement that they relinquished their dower would be regarded as surplusage, and would not vitiate the acknowledgment. *Chauvin v. Wagner*, 18 Mo. 531; *Miller v. Powel*, 53 Mo. 252. But where the certificate fails to state that they were made acquainted with the contents of the deed, the statement that they relinquished their dower would seem to exclude any implication or inference that they were cognizant of the contents and effect of the deed. The certificate of acknowledgment being defective as to Mrs. Hansard and Mrs.



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Putnam, the judgment is necessarily erroneous to the extent of their interests in the land.

The deed from the sheriff to the defendant offered in evidence by him, and under which he claims title to the

**5. SHERIFF'S DEED:** land in controversy, presents the same question which was considered by this court in

the case of *Bray v. McClury*, 55 Mo. 128, where apparently the same deed was held to be void because it was made under certain attachment proceedings without an affidavit therefor. We say apparently, because we cannot take judicial notice of the fact that the deeds are identical and there is no plea of *res judicata* in this case, nor could there be when the defendant pleaded not guilty, nor was the adjudication in that case offered in evidence, as it might have been, to rebut the defendant's claim of title under said deed. The opinion of Judge Adams in the case of *Bray v. McClury*, 55 Mo. 128, was expressly re-affirmed by this court in the case of *Hargadine v. Van Horn*, 72 Mo. 370, and adhering to the rule announced in those cases, the deed of the sheriff under which the defendant claims title, must, on the record and files in the attachment proceeding now before us, be held to be void. As to the right to look at the files, *vide*, also *Abbott v. Sheppard*, 44 Mo. 273; *Howard v. Thornton*, 50 Mo. 291; *Clark v. Thompson*, 47 Ill. 25; 67 Ill. 212; *Kane v. McCown*, 55 Mo. 181, *loc. cit.* 200; *Lenox v. Clarke*, 52 Mo. 115. There was no finding by the court that the writ of attachment was duly issued.

In the case now before us, however, as has already been stated, parol testimony was resorted to by plaintiff, to show that there was no affidavit for attachment, and by the defendant to show that an affidavit for attachment was filed by the attorney for the plaintiff in the proceeding referred to, and had been lost. We think the court erred in permitting the plaintiff in the first instance, to introduce evidence that no affidavit for attachment had ever been filed. The plaintiff had a right to introduce the original files to

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show that the judgment was a nullity; and when the defendant introduced testimony for the purpose of showing that the files were not complete, and that papers properly belonging in said files which would support the judgment of the court, had been lost or destroyed, the plaintiff might then introduce evidence in rebuttal, going to show that the files were complete and that no such papers as were alleged to be lost, ever existed. *Howard v. Thornton*, 50 Mo. 291; *Gibson v. Vaughan*, 61 Mo. 418; *Parry v. Walser*, 57 Mo. 169.

The court having found that the deed under which plaintiff claims title, was not altered after delivery, and that finding, for the reasons heretofore stated, being binding upon us, that deed is to be regarded by us as if it were originally written as it now appears, and the question remains whether the description contained in the deed of the land in the southwest quarter of section 6, will support the judgment rendered by the court. The plaintiff claims in his petition with other land, the north half of the southwest quarter, and the southwest quarter of the southwest quarter of section 6. The deed conveys the "north half of the southwest quarter the southwest quarter of section 6." The court rendered judgment for the north half of the southwest quarter, and the southwest quarter of the southwest quarter of section 6. The court evidently regarded the deed as containing a double description, that is, as covering the entire southwest quarter of section 6, which description standing alone, includes of course, the north half of the southwest quarter. If the court properly rejected the words "north half of the north west quarter" as superfluous, then its judgment is right, the interests of Mrs. Hansard and Mrs. Putnam excepted; otherwise its judgment is for too much. The general rule is, that effect should be given, if practicable, to every part of the description. The words the "north half of the southwest quarter the southwest quarter of section 6" cer-

6. DEED: description:  
call for quantify.

tainly constitute a novel description. It would seem to be highly improbable that a grantor would, under any conceivable circumstances first grant the north half of the southwest quarter, and then by words immediately following grant the entire southwest quarter. *Campbell v. Johnson*. 44 Mo. 247; *loc. cit.* 249, 250.

If the description were an abbreviated one and stood thus: "N. 1-2, S. W. 1-4, S. W. 1-4 sec. 6," few persons familiar with the system adopted for the survey and subdivision of lands in the western states, and the abbreviations in use for the designation of such subdivisions, would hesitate to construe such description to mean the north half of the southwest quarter of the southwest quarter of section 6. But when such abbreviated descriptions are translated into words, it is usual to insert both the words "of" and "the" after the words and figures designating the subdivisions.

After some hesitation we have reached the conclusion that the description under discussion should be held to mean the north half of the southwest quarter of the southwest quarter of section 6; and we are aided to this conclusion by the call for quantity contained in the deed. 3 Washburn, (3 Ed.) 348. The construction of the description contained in the deed which was adopted by the court, gives 220 acres in excess of the number of acres which the deed purports to convey. The construction which we have adopted gives only eighty acres in excess; and if sections 6 and 1 mentioned in the deed and bordering on the north and west of the township are fractional, as they may be, the construction we have adopted will probably give the exact quantity called for in the deed. If the heirs intended to convey more than our construction gives, the plaintiff will have to take the necessary steps to perfect his title. It necessarily follows that the judgment of the court was for more land in the southwest quarter of section 6 than the plaintiff was entitled to recover—besides being errone-

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ous as to the interests of Mrs. Hansard and Mrs. Putnam.

We see no reversible error in the action of the court other than that herein pointed out. The judgment will be reversed and the cause remanded. The other judges concur, except SHERWOOD, J., who dissents.

# INDEX.

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## ABATEMENT.

1. **NON-SURVIVAL OF ACTION FOR PERSONAL INJURIES.** An action for injuries to the person does not survive as against the executor of the wrong-doer. *Stanley v. Bircher*, 245.
2. A prosecution for violation of a city ordinance abates upon the death of the defendant. *The Town of Carrollton v. Rhomberg*, 547.
3. **JUSTICE'S COURT: ABATEMENT OF ACTION.** The perfecting of an appeal from the judgment of a justice of the peace divests the judgment of its legal effect, and if the case be one in which the cause of action does not survive, upon the death of the party before the entering of a lawful judgment in the appellate court, the action will abate. *Ib.*
4. **ACTION FOR DECEIT: SURVIVAL.** The right to maintain an action for deceit survives to the legal representatives of the party injured. This is true both under our statute, (R. S. 1879, § 96,) and at common law as modified by the statutes of 4 Edw. III, c. 7, and 31 Edw. III, c. 11. *Baker v. Crandall*, 584; *Whiting v. Crandall*, 593.
5. **DEATH OF PARTY: REVIVAL OF ACTION: WAIVER.** A party died during the pendency of a cause. His death was suggested, and without a formal order of revival his administrator appeared and the cause proceeded in the name of the administrator. The adverse party participated in the proceedings and never objected to the want of such an order till the cause reached this court. *Held*, that the objection then came too late. *Ib.*

## ACCORD AND SATISFACTION.

On the trial of an action against a railroad company for unlawfully occupying plaintiff's land, the plaintiff testified that before the company entered upon the land it gave plaintiff an agreement in writing to settle for it, but this agreement was not admitted or pleaded by the defendant as a defense, nor was it produced or offered to be produced at the trial. *Held*, that for the purpose of

basing upon it a defense of accord and satisfaction, it was not before the court. *Combs v. Smith*, 32.

### ACTION.

1. **NON-SURVIVAL OF ACTION FOR PERSONAL INJURIES.** An action for injuries to the person does not survive as against the executor of the wrong-doer. *Stanley v. Bircher*, 245.
2. **INN-KEEPER: ACTION FOR INJURY TO GUEST.** The obligation resting upon an inn-keeper to keep his guest safe, is one imposed by law and not growing out of contract, and for violation of it the action is an action on the case for the injury sustained, and not an action for breach of contract. *Ib.*

### ADMINISTRATION.

1. **LIABILITY OF DELINQUENT ADMINISTRATOR.** Where no final settlement has ever been made, an administrator *de bonis non* may maintain an action against a former administrator, who has failed to comply with an order of distribution, to recover the amount due the distributees. *Morehouse v. Ware*, 100.
2. **HOMESTEAD: ADMINISTRATOR'S SALE OF, WHEN VALID.** To make a sale of the homestead by an administrator valid, it must appear that the debt for the payment of which it was sold, was contracted before the homestead right attached or was acquired; and the burden of showing this rests on him who claims under the administrator's deed. *Kelsay v. Frazier*, 111.
3. **—: AN AGREEMENT CONSTRUED.** The widow and heirs of a decedent agreed together as follows: "We hereby obligate ourselves to divide the estate of the deceased, after the payment of all debts and expenses of administration, into three equal parts and each take one-third, in full of all claims and demands against said estate; it being hereby intended by the widow of said deceased, to relinquish all claim of dower, in consideration of the above provision; and, we further agree, if said division cannot be made, in kind, that the property shall be sold by the public administrator of Morgan county, and, after the expenses are paid, the proceeds of such sale divided among us according to our respective interests, as above stated." *Held*, that this was simply an agreement as to how the estate should be divided after the payment of debts, and did not authorize the probate court to have the homestead right of the widow sold for the payment of debts. *Ib.*
4. **ADMINISTRATOR: INVESTING FUNDS OF THE ESTATE.** When an administrator, without first being authorized by an order of the probate court so to do, lends out or invests the funds of the estate in his hands, he does so at his peril. *Garesche v. Priest*, 128.
5. **NON-SURVIVAL OF ACTION FOR PERSONAL INJURIES.** An action for injuries to the person does not survive as against the executor of the wrong-doer. *Stanley v. Bircher*, 245.



6. **ADMINISTRATOR OR CURATOR'S SALE: WHEN APPROVED, VESTS TITLE, WITHOUT MORE.** When a sale by an administrator or curator under an order of court has been regularly approved by the court, this fact of itself passes to the purchaser an equity for the legal title, which equity, notwithstanding an irregular deed or the want of any deed, the court will enforce in his favor by denying recovery in ejectment by the heirs, or by vesting him with the perfect title; provided, always, that he has on his part complied with the terms of the sale. *Henry v. McKertie*, 416.
7. ———: **WHEN NOT APPROVED, PURCHASER'S EQUITY: ITS NATURE AND EFFECT: ESTOPPEL.** When the sale has not been approved, no title either legal or equitable passes to the purchaser; but he has an equity for a return of the purchase money, and re-imbursement for the benefits received by the heirs and for improvements which enhance the value of their lands. The extent of this equity is to be ascertained by an account of his expenditures and receipts. The effect of it is to suspend the right of recovery until the amount coming to him shall be ascertained and paid. It is administered upon the theory that the title has not passed to the purchaser, but that he has a charge or lien for his outlays and improvements made in good faith. It does not spring from or depend upon the law of estoppel; neither does it exclude the purchaser from lawfully claiming the title under the law of estoppel in a proper case. *Ib.*
8. ———: **WHEN PREMATURELY APPROVED—IN THE CIRCUIT COURT.** When the sale has been prematurely approved in the circuit court, as this is a court of general jurisdiction, the sale is valid, and the equity of the purchaser is for a perfect title, and will defeat recovery in ejectment. *Ib.*
9. ———: ———, **IN THE PROBATE COURT.** When the sale has been prematurely approved in the probate court, this fact was by the earlier decisions in this State regarded as equivalent to no approval at all. The sale was regarded as absolutely void and passing no title either legal or equitable, and the purchaser had only such equities as he would have had if there had been no approval. But this doctrine has been overruled by the later decisions, and such sales are now held to be as valid as if the approval had been in the circuit court, on the ground that the same presumptions of validity must be entertained in respect to judgments and orders of the probate court in matters relating to the administration of estates, as are accorded to the judgments and orders of the circuit court. *Ib.*
10. ———: **EVIDENCE OF APPROVAL.** The approval of the sale by the court need not necessarily appear by a formal entry. It is sufficient if the approval can be gathered from the whole record. The equity for a title is then complete. *Ib.*
11. ———: **APPEAL.** An appeal from a final order of the circuit court disapproving a sale which has been approved by the probate court before appeal to the circuit court, may be taken to the Supreme Court. *Ib.*
12. ———: **PLEADING.** The facts which constitute an equity under the foregoing rules must be pleaded in order to be available as a defense to an action of ejectment. It is not essential to the validity of a

curator's deed that it should recite the order of sale, appraisement, report of sale and approval of sale. The statute requires these recitals to be made; but this is only directory. If the facts exist they may be shown *aliunde* to support the deed.

The deed in this case referred to the order of sale and the court and term at which it was made, and the curator assumed in it to act only in his fiduciary capacity. *Held*, sufficient to pass the title. *Ib.*

13. PLEADING: ALLEGATA ET PROBATA: ADMINISTRATOR'S BOND. In an action upon an administrator's bond, the petition alleged that, on a certain day, the administrator sold to a certain person, at public sale, cattle belonging to the estate to a certain amount, delivered the said cattle, but wholly failed and neglected to take from said purchaser a note with security, or any note whatever; that said purchaser had failed and refused to pay the purchase money, and, since said sale, had become wholly insolvent, so that said amount could not be collected from him; that said administrator never took any steps as such, as by law required, to secure the payment of the purchase money or collect same from purchaser. There was no demurrer to this petition, or motion to make it more definite or certain. Upon the trial, plaintiff offered in evidence a note payable to the administrator for the purchase money signed by the purchaser and others, and testimony that the makers of this note, when it was given, were insolvent. Defendant objected to this evidence on the ground that it was not admissible under the allegations of the petition. *Held*, that such allegations were sufficient to justify the admission of the evidence. *The State ex rel. Griggs v. Edwards*, 473.

14. PRIORITY OF JUDGMENTS. Those provisions of the Administration Act which ordain the payment of judgments against the estates of deceased persons in the order of priority of their liens, can be invoked only when an estate is insolvent. By this is meant such a condition as renders it necessary to obtain satisfaction by means of the lien on the real estate. Proof that the personalty is insufficient to pay the judgment is sufficient evidence of insolvency. *Bassett v. Elliott's Administrator*, 525.

#### ADMIRALTY JURISDICTION.

See *Turner v. Stewart*, 480.

#### ADOPTION OF CHILDREN.

**RELINQUISHMENT OF PARENTAL RIGHTS.** A widowed mother joined in executing a deed of adoption of her child. A day or two afterward, at her request, the adopter signed a paper stating that she could "have her son (the adopted child) at any time she calls for him." *Held*, (1) that under the statute, (R. S. 1879, § 601,) by joining in the deed she relinquished her parental rights over the child; (2) that the subsequent paper could not be construed to work a revocation of the deed; it was evidently intended to allow her only the temporary custody and society of the child. *In the Matter of Charles B. Clements*, 352.

## ADVERSE POSSESSION.

SEE LIMITATIONS.

## ALTERATION.

**ALTERATION OF NOTE.** Any alteration of a written instrument, after delivery, however immaterial in its nature, or however innocently made, without the consent of all parties, vitiates the instrument as to the parties not consenting.

**CASE ADJUDGED.** A note signed by C. & G. and by S. D. G. payable to the order of S. D. G., after its delivery to the parties for whom it was intended, was by them sent to S. D. G., who erased his signature as maker, indorsed said note and returned the same without the knowledge or consent of the other makers. *Held*, that, as to them, such alteration rendered the note void. *Morrison v. Garth*, 434.

## AMENDMENT.

**PRACTICE: AMENDMENT: JUSTICE'S COURT.** The circuit court, on appeal from a justice, may allow the constable to amend his return on the summons, according to the fact, so as to show proper service on the defendant. *Turner v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 578.

**STATING A DIFFERENT CAUSE OF ACTION.** See *Fields v. Maloney*, 172.

**AMENDMENT OF IRREGULAR SUMMONS.** See *Stone v. The Traveler's Insurance Company*, 655.

## APPEALS.

1. **APPEAL FROM ST. LOUIS COURT OF APPEALS.** In a case in which an appeal lies from the St. Louis court of appeals only because constitutional questions are involved, this court will consider those questions only. *Eyerman v. Blaksley*, 145.
2. **AN APPEAL** must be perfected at the same term at which the court disposes of the motions for new trial and in arrest; no agreement of parties and order of the court will authorize an appeal at a subsequent term; the right of appeal depends upon compliance with the statutes. *Randolph v. Mauck*, 468.
3. **JUSTICE'S COURT: ABATEMENT OF ACTION.** The perfecting of an appeal from the judgment of a justice of the peace divests the judgment of its legal effect, and if the case be one in which the cause of action does not survive, upon the death of the party before the entering of a lawful judgment in the appellate court, the action will abate. *The Town of Carrollton v. Rhomberg*, 547.
4. **THIS CASE** was stricken from the docket for want of an order in the record allowing the appeal. *Newman v. Biggs*, 675.

## ARBITRATION.

1. **THE AWARD.** If an award is broader than the submission, and either constitutes one entirety or its several parts are so connected as to be conditional and dependent upon one another, it will be void; but if one part is complete in itself, and is separable from and independent of the rest, and that part is covered by the submission, it will be upheld, while the rest will be rejected; but even the part not within the submission will become binding if accepted by the parties. *Ellison v. Weathers*, 115.
2. ———: **RATIFICATION.** No new consideration is necessary to uphold a subsequent ratification of an unauthorized award. *Ib.*
3. ———: **WITNESS.** An arbitrator is not a competent witness to impeach his own award. *Ib.*

## ARSON.

1. **INDICTMENT FOR ARSON.** An indictment for an attempt to commit arson may properly combine in one count what the defendant did, himself, and that which he solicited another to do in making the same attempt. *The State v. Hayes*, 307.
2. ———. An indictment for an attempt to commit arson is not bad because it alleges that the defendant is the owner of the house; arson being defined by statute to be the burning of any dwelling house in which there is at the time some human being. *Ib.*

## ASSAULT.

1. **ASSAULT TO KILL: EVIDENCE.** Upon a trial for assault to kill, evidence of all the circumstances connected directly with the assault, showing its character, is competent. *The State v. Hoffman*, 256.
2. ———: ———. **POWER TO MAKE ARRESTS.** Upon a trial for assault to kill, it appeared that the person assaulted at the time had another under arrest. *Held*, that it was wholly immaterial whether he was an officer authorized to make arrests or not. *Ib.*

## ASSIGNMENT.

1. **CORPORATION: ASSIGNMENT FOR BENEFIT OF CREDITORS.** An assignment of all the assets of an insolvent corporation for the benefit of creditors, if made by the board of directors without the consent of the stockholders, is *ultra vires* and void, but only as against the stockholders. A creditor of the corporation cannot make the objection. *Eppright v. Nickerson*, 482.
2. **ASSIGNMENT: WHAT IT PASSES.** A deed of assignment which makes no reference to a schedule of assets accompanying it, will not be limited in its operation to the assets embraced in the schedule, but will pass any which come within its terms. *Ib.*

3. ———: LIABILITY OF STOCKHOLDERS MAY BE ASSIGNED. An insolvent corporation may include in an assignment for the benefit of its creditors the liability of its stockholders for unpaid stock for which no call has been made. *Ib.*

## ATTACHMENT.

1. IN ATTACHMENT SUITS judgments should be general, where the defendant appears and defends. A judgment in favor of the plaintiff in such a suit, to be satisfied by sale of the property attached at the commencement of the action, where the defendant appeared and defended; *Held*, to be erroneous; the judgment, if plaintiff were entitled to any, should have been general. *Maupin v. The Virginia Lead Mining Company*, 24.
2. SHERIFF'S DEED: ATTACHMENT: EVIDENCE. A sheriff's deed in attachment proceedings taken without the statutory affidavit is void; and where the record shows no finding that the writ of attachment was duly issued, the court files may be read in evidence to determine whether there was such an affidavit or not, and if none appear, then parol evidence is admissible on the one hand to show that some of the files have been lost or destroyed, and on the other that files alleged to be lost or destroyed, never existed. *Burnett v. McCluey*, 676.

## BILL OF EXCEPTIONS.

1. A BILL OF EXCEPTIONS may be signed and filed as well after as before the allowance of the appeal, following *State v. Dodson*, 72 Mo. 283, and overruling *State v. Musick*, 7 Mo. App. 597. *Carter v. Prior*, 222.
2. A BILL OF EXCEPTIONS, presented and filed in vacation, requires the consent of both parties and the concurrence of the court expressed on the record; a mere stipulation between the parties will not answer. *Ib.*
3. THE FILING OF A BILL OF EXCEPTIONS, if in term time, must be proven by the record, if in vacation, by the indorsement thereon of the filing of such bill by the clerk. *Ib.*
4. BILL OF EXCEPTIONS: EVIDENCE OF FILING. The file mark of the clerk indorsed on the bill and copied into the record, is the only proper evidence of the filing of the bill of exceptions in vacation. *Campbell v. The Missouri Pacific Railway Company*, 689.

## BILLS OF EXCHANGE.

1. PRESENTMENT FOR ACCEPTANCE: PLEADING. The petition in an action by the indorsee against an indorser of a bill of exchange alleged that the bill was presented to the drawee "for acceptance, and was by him then and there declined and refused acceptance, and not accepted." *Held*, that this was a sufficient averment of a demand of acceptance. *The First National Bank of Burlington v. Hatch*, 13.

2. To make a valid presentment of a bill of exchange for acceptance; it is not necessary that the notary should actually produce the bill, it is sufficient if he has it with him ready to produce in case the drawee calls for it. *Ib.*
3. NOTARY'S CERTIFICATE. The certificate of a notary under seal, under the law merchant, was evidence of presentment, refusal and protest; and it is so recognized by our statute, (Wag. Stat., 218, § 20). When it also recites notice of dishonor to the parties, the statute makes it evidence of notice as well as of dishonor, provided it is verified. Wag. Stat., p. 598, § 50. *Ib.*
4. NOTICE of dishonor need not be in writing, and is not necessarily given by a notary. The holder of the paper may give it. No particular form of words is necessary. *Ib.*
5. PLEADING AND PROOF. When the plaintiff in his petition alleges presentment and notice of dishonor, he cannot prove waiver of such conditions in the absence of proper averments of a waiver. *Ib.*
6. NOTICE. Where the indorsers are successive and not co-sureties, proper notice to any one of them is sufficient to hold him. *Ib.*

## BITTERS.

See *The State v. Lillard*, 136.

## CARRIERS.

SEE RAILROADS.

## CARROLLTON.

AN appeal lies from the mayor's court of the town of Carrollton in all cases. *The Town of Carrollton v. Rhomberg*, 547.

## CHANGE OF VENUE.

- 1 FINDING OF TRIAL COURT. The trial of the issue made on a petition for a change of venue, is by the court, and unless manifest error occur to the prejudice of the accused, the appellate court will not interfere with the finding. *The State v. Burgess*, 234.
- 2 OPINIONS OF WITNESSES. Upon the trial of this issue it is error to take the opinions of witnesses as to whether the applicant can have a fair trial or not. They should be interrogated as to facts tending to show whether there is or is not prejudice. But if there is enough other evidence to support the finding of the court, the judgment will not be reversed for error in this particular. *Ib.*

JURISDICTION CONFERRED BY, IN PARTITION CASES. See *Fields v. Maloney*, 172.



## CHILDREN.

SEE ADOPTION OF CHILDREN.

## COAL-OIL.

See *The State v. Hayes*, 307.

## COMMON LAW.

1. THE COMMON LAW: ANCIENT ENGLISH STATUTES. Independent of statutory enactment, it is the established doctrine that English statutes passed before the emigration of our ancestors applicable to our situation, and in amendment of the law, constitute a part of the common law of this country. *Baker v. Crandall*, 584.
2. STATUTE LAWS OF SISTER STATES: COMMON LAW. Judicial notice will not be taken of the statutes of a sister state; and it will not be presumed that the common law is in force in the state of Louisiana. *Sloan v. Torrey*, 623.

## CONSIDERATION.

RATIFICATION. No new consideration is necessary to uphold a subsequent ratification of an unauthorized award. *Ellison v. Weathers*, 115.

AS BETWEEN HUSBAND AND WIFE. See *Sloan v. Torrey*, 623.

## CONSTABLES.

LIABILITY OF THEIR SURETIES. See *The State ex rel. Bueneman v. Kurtzeborn*, 98.

## CONSTITUTIONAL LAW.

1. LOCAL LAWS CHANGING THE RULES OF EVIDENCE: SPECIAL TAX BILL. The prohibition in the constitution against the general assembly passing any special or local law "changing the rules of evidence in any judicial proceeding," relates only to proceedings pending when the change is made. A city charter which makes special tax bills *prima facie* evidence of liability is not in conflict with this section, so far as respects bills issued after the enactment of the charter. *Eyerman v. Blaksley*, 145.
2. LOCAL ASSESSMENTS: DUE PROCESS. Local assessments for sewers and other public improvements may be made without violating the constitutional provision that no person shall be deprived of life, liberty or property without due process of law. *Ib.*

3. APPEAL FROM ST. LOUIS COURT OF APPEALS. In a case in which an appeal lies from the St. Louis court of appeals only because constitutional questions are involved, this court will consider those questions only. *Ib.*
4. RETROSPECTIVE OPERATION OF STATUTES AND CONSTITUTIONS: ELECTION OF CORPORATION DIRECTORS. The intent to give a retrospective operation to a law must be clearly expressed in order that it may receive such a construction; and this is equally as true of constitutional provisions as of statutes. So, where a legislative charter provided that directors of the corporation should be elected by vote of stockholders, allowing one vote for every share, and also provided that the legislature should have no power to alter, suspend or repeal the charter, and subsequently a constitutional provision was adopted providing in general terms for cumulative voting at all elections of corporation directors; *Held*, that as there was nothing in this provision specially applicable to the corporation in question, and as there were other corporations in existence when the constitution was adopted to which it could apply, in addition to those which might thereafter be incorporated, it would be held not to operate upon this particular corporation. *The State ex rel. Haessler v. Greer*, 188.
5. LAW IMPAIRING OBLIGATION OF CONTRACTS: RIGHT TO VOTE AT CORPORATION ELECTIONS. The right of corporators to vote at elections for directors, is a property right, and if the mode of voting is prescribed by an irrepealable charter, is protected by that provision of the constitution of the United States which prohibits the states from passing laws impairing the obligation of contracts, so that the State cannot interfere with it either by constitutional or legislative enactment. *Ib.*
6. POLICE REGULATIONS. A law regulating the mode of voting at corporation elections, cannot be called a police regulation. *Ib.*
7. DRAMSHOP LICENSE: POLICE POWER: TAXING POWER. The license fee exacted by the general law regulating dramshops and the amendatory act of March 24th, 1883, (Sess. Acts 1883, p. 86, § 3,) is not a tax. It is a price paid for the privilege of carrying on a business which is detrimental to public morals and which the legislature, in the exercise of the police power, has the right to prohibit altogether. The act, therefore, is not void because it does not conform to the restrictions of sections 1, 3 and 10 of article 10 of the constitution in relation to the exercise of the taxing power. *The State ex rel. Trott v. Hudson*, 302.
8. THE EXERCISE OF THE TAXING POWER. Section 3 of article 10 of the constitution, which declares that all taxes shall be levied by general laws was intended to restrict the power of the legislature in passing laws for the levy of taxes to the passage of general laws as distinguished from local and special laws, and it did not repeal charter provisions authorizing the levy of taxes. *The City of Kansas v. Johnson*, 661.

## CONTRACTS.

1. **CONTRACT FOR CITY WORK ; NEED NOT BE IN WRITING : PAROL EVIDENCE.** An ordinance of the city provided that no one should have power to create any liability on account of the Board of Park Commissioners except with the express authority of the board. By resolution of the board, a committee consisting of the president and two other persons were authorized to contract for certain work, "and to report." In an action on a written contract for the work signed by the president alone for the board; *Held*, that there being no law or ordinance requiring the contract to be in writing, parol evidence was admissible to show that the other members of the committee assented to the making of the contract. *Held* also, that as it did not appear that the contract was to be reported for approval or rejection by the board, failure of the committee to report it did not affect the rights of the contractor. *McQuade v. The City of St. Louis*, 46.
2. **INN-KEEPER : ACTION FOR INJURY TO GUEST.** The obligation resting upon an inn-keeper to keep his guest safe, is one imposed by law and not growing out of contract, and for violation of it the action is an action on the case for the injury sustained, and not an action for breach of contract. *Stanley v. Bircher*, 245.
3. **CONTRACTS, CONSTRUCTION OF.** A contract which is not precise in its terms must be construed in the light of the facts and circumstances surrounding the subject matter it embraces. *Crawford v. Elliott*, 497.
4. **CASE ADJUDGED.** A contract was made for the sale of the sound and dry corn in two cribs at a price seventeen cents below that of "No. 2 mixed corn" in St. Louis. It was provided that the corn should be kept dry so that shellers should have no trouble to keep the damaged separate from the dry and sound. Both parties knew that some was then damp. The seller reserved such as was damaged, and the purchaser agreed to shell and carry off the corn purchased at his own expense. In shelling the purchaser failed to separate the damp from the dry, and in consequence, some of the corn received in St. Louis did not grade "No 2 mixed." *Held*, upon consideration of all the circumstances, that while the purchaser was not bound to take damaged corn yet if he took it he was bound to pay for it at the price stipulated. *Ib.*
5. **JOINT CONTRACT : PARTIES TO SUIT.** All the joint obligees of a bond are necessary parties plaintiff in an action for its breach; one of them cannot be made a co-defendant, upon an allegation in the petition that he refused to join with plaintiffs in the prosecution of the action. Section 3466, Revised Statutes 1879, does not apply to such a case. *McAllen v. Woodcock*, 60 Mo. 174, distinguished. *Ryan v. Riddle*, 521.
6. **CONTRACT TO SHIFT STATUTE DUTY.** The liability of a railroad company for failure to erect fences on the sides of its road under the statute cannot be defeated by its contract with another person to erect such fences. *Silver v. The Kansas City, St. Louis & Chicago Railroad Company*, 528.

CONSIDERATION. See *Ellison v. Weathers*, 115.

IMPAIRING OBLIGATION OF CONTRACTS. See *State ex rel. Haeussler v. Greer*, 188.

PAROLE EVIDENCE TO EXPLAIN INCOMPLETE MEMORANDUM. See *Lash v. Parlin*, 391.

### CORPORATIONS.

1. EMPLOYMENT OF ATTORNEY BY SUBORDINATE OFFICERS. A corporation is not liable for the value of services performed for it by an attorney at law by reason, merely, of his employment by a subordinate officer or agent, to whom no delegation of authority to employ an attorney is shown. *Maupin v. The Virginia Lead Mining Company*, 24.
2. RECEIVER: HIS LIABILITY FOR TORTS. An action may be maintained against the receiver of a corporation for a tort committed by the corporation before his appointment. The judgment, if for the plaintiff, will be against him in his capacity as receiver, and is leviable out of the assets in his hands. *Combs v. Smith*, 32.
3. RETROSPECTIVE OPERATION OF STATUTES AND CONSTITUTIONS: ELECTION OF CORPORATION DIRECTORS. The intent to give a retrospective operation to a law must be clearly expressed in order that it may receive such a construction; and this is equally as true of constitutional provisions as of statutes. So, where a legislative charter provided that directors of the corporation should be elected by vote of stockholders, allowing one vote for every share, and also provided that the legislature should have no power to alter, suspend or repeal the charter, and subsequently a constitutional provision was adopted providing in general terms for cumulative voting at all elections of corporation directors; *Held*, that as there was nothing in this provision specially applicable to the corporation in question, and as there were other corporations in existence when the constitution was adopted to which it could apply, in addition to those which might thereafter be incorporated, it would be held not to operate upon this particular corporation. *The State ex rel. Haeussler v. Greer*, 188.
4. LAW IMPAIRING OBLIGATION OF CONTRACTS: RIGHT TO VOTE AT CORPORATION ELECTIONS. The right of corporators to vote at elections for directors, is a property right, and if the mode of voting is prescribed by an irrevocable charter, is protected by that provision of the constitution of the United States which prohibits the states from passing laws impairing the obligation of contracts, so that the State cannot interfere with it either by constitutional or legislative enactment. *Ib.*
5. POLICE REGULATIONS. A law regulating the mode of voting at corporation elections, cannot be called a police regulation. *Ib.*
6. CORPORATION ASSIGNMENT: CERTIFICATE OF ACKNOWLEDGMENT. To an assignment for the benefit of creditors executed by a corporation was appended a notary's certificate that M. C., president, and A. M.,

cashier, of the corporation, "acknowledged that they executed and delivered the same as their voluntary act and deed, for the uses and purposes therein contained." *Held*, that this was a sufficient certificate that the corporation acknowledged the instrument. *HOUGH, C. J.*, and *HENRY, J.*, dissented. *Epwright v. Nickerson*, 483.

7. CORPORATION: ASSIGNMENT FOR BENEFIT OF CREDITORS. An assignment of all the assets of an insolvent corporation for the benefit of creditors, if made by the board of directors without the consent of the stockholders, is *ultra vires* and void, but only as against the stockholders. A creditor of the corporation cannot make the objection. *Ib.*
8. ———: LIABILITY OF STOCKHOLDERS MAY BE ASSIGNED. An insolvent corporation may include in an assignment for the benefit of its creditors the liability of its stockholders for unpaid stock for which no call has been made. *Ib.*
9. CORPORATE UNDERTAKING: LIABILITY OF ASSOCIATES FOR FRAUDULENT MANAGEMENT. Where several persons engage in business jointly, and, to facilitate such business use a corporate name and issue stock, and, in the promotion of the scheme, false representations are made by those holding themselves out as promoters and managers of the business as to the material facts of inducement and as to matters peculiarly within the knowledge of all the associates or their agents, all those engaged in the promotion of the business as associates of those making the false representations are liable to those who, relying upon such representations, purchase stock to their hurt. *Hornblower v. Crandall*, 581; *Whiting v. Crandall*, 593.
10. ———: ———: INNOCENCE NO PROTECTION, WHEN. That one of the associates thus connected is ignorant of the details of the business, will not avail him where he had the means of knowing but trusted to his associates, and where he, with the others, received the benefits of the wrong-doing. *Ib.*
11. BY-LAWS. That the by-law of a corporation establishes a rule different from the common law rule does not make it invalid. *Godard v. The Merchants' Exchange of St. Louis*, 609.
12. ———. A by-law of a board of trade which provides that "on all sales of grain in bulk on elevator receipts, the buyer shall pay the first ten days' storage, unless otherwise specified, at the time of sale," is not invalid, and may be enforced. *Ib.*

#### COSTS.

1. COSTS IN CRIMINAL CASES: MINORS. A minor filed a complaint before a justice of the peace, charging defendant with disturbing the peace of the family of another, and the trial resulted in a verdict of acquittal; *Held*, under the provisions of the statutes then in force, (2 Wag. Stat., 854, § 12, amended by Acts 1877, p. 281,) that the costs should have been adjudged against the county, on the ground that the informant was not the injured party; but, *Held* further, that if he had been, a judgment against him would not have been obnoxious to objection on the ground of his minority. *The State v. Lavelle*, 104.

2. **RE-TAXATION OF COSTS.** The court may, upon notice, correct an error in the taxation of costs after the lapse of the judgment term and after the judgment and costs as first taxed have been paid. *The State ex rel. Clinton County v. The Hannibal & St. Joseph Railroad Company*, 575.

### COTENANCY.

**DEVISE.** A devise to a class, though as tenants in common, will not lapse by the death of one of the devisees before the testator, but the survivors take the whole. *Crecelius v. Horst*, 566.

### COUNTER-CLAIM.

1. **NOTHING** can be pleaded as a statutory counter-claim that does not constitute a demand against the plaintiff. *Barnes v. McMullins*, 260.
2. **NEGOTIABLE PAPER: TRANSFER AFTER MATURITY: COUNTER-CLAIM: OFFSET.** In this State, when a negotiable note is indorsed or transferred after maturity, the right of offset or counter-claim on an independent contract does not follow it in the hands of the assignee. We adhere to the English rule that only such equities follow it as arise out of or inhere in it, and that the assignee takes it divested of all rights and claims arising out of independent transactions. See *Cutler v. Cook*, 77 Mo. 388. *Ib.*
3. **EQUITY JURISDICTION OF CROSS-DEMANDS: GENERAL RULES: INSOLVENCY: NON-RESIDENCE.** The jurisdiction of equity to afford relief in behalf of a cross-demand in a proper case, is of ancient origin. It existed prior to any statute of set-off; and still exists independent of any such statutes. But courts of equity are often enabled by them, on the well-known principle of following the law, to afford more efficient relief and in a greater variety of cases than before the statute.  
The relief given depended upon the circumstances of each case, sometimes there would be a decree that the demand of the defendant be applied to the payment and discharge of the demand sued on; sometimes a decree restraining the plaintiff from prosecuting his demand till the defendant had established or failed to establish his cross-demand in a court of law. The moving principle was not so much the inconvenience and circuity of two actions, as the injustice of compelling the defendant to pay the demand against him and take the chances of insolvency of the plaintiff or the plaintiff's assignor. In cases where it was ascertained that the plaintiff was only a nominal owner or assignee without value, the court would decree an offset; but in all such cases there had to be some fact, such as insolvency or non-residence, showing imminent danger of the defendant being compelled to pay without receiving credit for his cross-demand. *Ib.*
4. **——: UNLIQUIDATED CROSS-DEMANDS.** Whether this jurisdiction may be exercised in favor of cross-demands at law arising *ex contractu*, or of equitable cross-demands, such as the right to a prospective balance in an unsettled partnership, is discussed but not decided. But in no case will it be exercised in favor of an unliquidated cross-de-



mand *ex delicto* in its nature. Compare *Reppy v. Reppy*, 46 Mo. 571. *Ib.*

- 5 STATUTORY COUNTER-CLAIM: "ACTION ARISING ON CONTRACT." In determining what may be considered as "an action arising on contract," within the meaning of the second subdivision of section 3522, Revised Statutes 1879, a rather liberal construction has been employed by the courts. All independent express contracts, whether liquidated or unliquidated, are the subject of counter-claim under this subdivision, as a matter of course; and it has been held that in all that class of cases in which a tort has been suffered and the law permits the sufferer to waive the tort and sue upon an implied contract, if he indicates in his plea that he is proceeding on the implied assumpsit, his action will be sustained under this subdivision as an action arising on contract. *Ib.*
- 6 CASE ADJUDGED. The cross-demand asserted in the present case being one for fraud and deceit practiced in making and executing a contract of sale, rather than for breach of the contract; *Held*, that it could not be entertained, the plaintiff's action being upon a promissory note having no connection with the contract of sale. *Ib.*

## COURTS.

1. APPEAL FROM ST. LOUIS COURT OF APPEALS. In a case in which an appeal lies from the St. Louis court of appeals only because constitutional questions are involved, this court will consider those questions only. *Eyerman v. Blaksley*, 145.
2. PRACTICE: SPECIAL JUDGE: WAIVER. An objection made for the first time in the appellate court that the attorney, agreed upon by the parties to act as judge in the trial of the cause, did not before doing so take the requisite oath, will be disregarded. *Carter v. Prior*, 222.
3. TEMPORARY JUDGE: CHANGE OF VENUE: IN CIVIL CASES. Under the act of 1877 in relation to temporary judges (Acts 1877, p. 217; R. S. 1879, §§ 1106 to 1113,) if an affidavit of prejudice was filed against the regular judge in a civil case, and the parties failed to agree upon a substitute, the judge might either order an election of a temporary judge for the trial of the case by the members of the bar present, as provided by that act, or grant a change of venue to another circuit, as provided by Wagner's Statutes, page 1355, sections 1, 2, 3, 4. *Barnes v. McMullins*, 260.
4. ———. The above act of 1877 authorizing election of temporary judges in civil cases was constitutional. *Ib.*
5. ———. If a temporary judge elected under that act was disqualified by prejudice, the act provided for holding another election. There was no right to a change of venue. *Ib.*
6. JUDGE A PARTY TO THE RECORD. Where the circuit court consists of two judges sitting separately, (as in Jackson county,) if both happen to be parties to the record of a cause, it is not error for

the one before whom the cause comes in the ordinary course to refuse to send it to the other for trial. *The City of Kansas v. Knotts*, 356.

7. ———. A judge who is a party to the record cannot sit in the case even by consent of parties. The statute which authorizes a judge "who is interested in any suit" to try it, if the parties consent, has no application to such a case. R. S., § 1041. *Ib.*

### COVENANTS.

**BREACH OF COVENANT AGAINST INCUMBRANCES; DAMAGES.** An inchoate right of dower existing at the date of a deed containing a covenant against incumbrances, and the demand of dower after it becomes consummate, will constitute a breach of such covenant; and the covenantee may by purchase thereafter extinguish the dower and recover a reasonable price paid therefor as damages for such breach. *Ward v. Ashbrook*, 515.

### CRIMINAL LAW.

1. **RIGHT OF ACCUSED TO BE PRESENT IN COURT.** The accused has the right to be present when his motion for new trial is heard. To refuse his counsel's request to have him brought into court for that purpose, is error requiring reversal of a judgment of conviction. *Sherwood and Norton, JJ.*, dissented. *The State v. Hoffman*, 256.
2. ———: ———. **POWER TO MAKE ARRESTS.** Upon a trial for assault to kill, it appeared that the person assaulted at the time had another under arrest. *Held*, that it was wholly immaterial whether he was an officer authorized to make arrests or not. *Ib.*
3. **SOLICITING ANOTHER TO COMMIT CRIME.** The soliciting of another to commit crime is an act toward its commission, although the person solicited does not yield to nor act upon the solicitation. *The State v. Hayes*, 307.
4. **ATTEMPT TO COMMIT CRIME: LOCUS PENITENTIAE.** Defendant having made preparations for burning a building, left his supposed accomplice at the building, saying he would go and get some matches, but did not return, and an hour or so afterward was arrested; *Held*, that his failure to return was not proof that he had abandoned his purpose. Anywhere between the conception of the intent and the overt act toward its commission there is room for penitence, and the law in its beneficence extends the hand of forgiveness. But when the evil intent is supplemented by the requisite act toward its commission, the offense is complete. *Ib.*
5. **LIMITATION TO CRIMINAL PROSECUTION.** When an indictment is quashed the time during which it was pending, is not to be computed as a part of the time of the limitation prescribed for the offense. R. S. 1879, § 1707. *The State v. Owen*, 367.
6. **REASONABLE DOUBT: INSTRUCTIONS.** The court instructed the jury that before they convicted defendant they ought to be satisfied of

his guilt beyond a reasonable doubt. *Held*, that it was not for the defendant to complain that the court failed to add that such doubt ought to be a substantial doubt touching his guilt and not a mere possibility of his innocence. If defendant desired this addition to the instruction he should have asked for it. *The State v. Leeper*, 470.

7. EVIDENCE OF DEFENDANT'S GOOD CHARACTER. In a criminal prosecution evidence of the good character of the defendant is always admissible; but the law limits the inquiry to his general character as to the trait in issue; a witness will not be allowed to express his individual opinion. *The State v. King*, 555.
8. PRESUMPTION OF GUILT ARISING FROM FLIGHT. Flight from a charge of crime raises a presumption of guilt; but this presumption may be modified or overthrown by evidence showing that the flight was occasioned by other causes than consciousness of guilt, and when there is such evidence the jury should be directed to consider it and determine how far it tends to rebut the presumption. *Ib.*
9. ———: REASONABLE PROVOCATION: HEAT OF PASSION. The insulting conduct proven in this case was not such as to constitute reasonable provocation, so that the defendant could not have been in a heat of passion when he committed the assault. *Ib.*
10. NOT TWICE IN JEOPARDY. After a jury had been empanelled in a criminal case and before any evidence had been submitted, the defendant interposed an objection to the sufficiency of the indictment. The objection was sustained, the indictment quashed and the jury discharged. The defendant having been afterward tried upon another indictment found for the same offense; *Held*, that he had not been twice put in jeopardy. *The State v. Hays*, 600.
11. RIGHT OF ACCUSED TO MEET ADVERSE WITNESSES: WAIVER. Where the defendant in a criminal prosecution, in order to avoid a continuance, consents that a written statement presented by the prosecuting attorney as containing the testimony of absent witnesses shall be read to the jury as and for their testimony, he thereby waives his constitutional right to meet the witnesses against him face to face. *The State v. Wagner*, 644.

AUTREFOIS AQUIT. See *The State v. Owen*, 367.

SEE ALSO ARSON.

ASSAULT.

EMBEZZLEMENT.

FORGERY.

JURY.

LARCENY.

MURDER.

## CURATOR.

IRREGULAR SALES BY. See Henry v. McKerlie, 416.

## DAMAGES.

1. ACTION BY LEGAL REPRESENTATIVE FOR DEATH: MEASURE OF DAMAGES. The measure of damages in an action brought by the legal representative of an employe of a railroad company against the company for his death, is not the fixed sum of \$5,000, but a sum not exceeding \$5,000. The right of action is given by section 3 and not section 2 of the Damage Act. *Flynn v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 195.
2. MALICIOUS PROSECUTION: COUNSEL FEES. In an action for malicious prosecution, the jury, if they find for the plaintiff, may, but they are not bound to allow him counsel fees paid in defending against the prosecution. *Gregory v. Chambers*, 294.
3. ———: EVIDENCE OF CHARACTER. In an action for malicious prosecution, evidence of the general bad reputation of the plaintiff is admissible, in mitigation of damages, if not to aid in making out the defense of probable cause. *Ib.*
4. MEASURE OF DAMAGES IN ACTION FOR FLOODING LAND. In an action on the case for flooding land the plaintiff can recover only the damages done up to the institution of the suit. It is, therefore, error to instruct the jury that the proper measure of damages is the difference between the market values of the land immediately before and immediately after the flooding took place. *Benson v. The Chicago & Alton Railroad Company*, 504.
5. BREACH OF COVENANT AGAINST INCUMBRANCES: DAMAGES. An inchoate right of dower existing at the date of a deed containing a covenant against incumbrances, and the demand of dower after it becomes consummate, will constitute a breach of such covenant; and the covenantee may by purchase thereafter extinguish the dower and recover a reasonable price paid therefor as damages for such breach. *Ward v. Ashbrook*, 515.

## DEDICATION.

1. DEDICATION OF MARRIED WOMAN'S LAND TO PUBLIC USE. The dedication to public use of the wife's land by the husband will not be effectual even as to his curtesy, unless she join in the conveyance and acknowledge the same in the manner provided by law. *The City of Marshall v. Anderson*, 85.
2. ———: ESTOPPEL IN PAIS. Where the husband alone files a plat of his wife's land, their joint conveyances thereafter of lots designated on such plat will create no estoppel *in pais* against her, in favor of the public, to assert title to land designated on the plat as a street. *Ib.*

3. **DEDICATION TO PUBLIC USE.** The plat in evidence in this case examined and *Held* to amount to a dedication of certain parcels of land to public use. *The City of California v. Howard*, 88.
4. **EJECTMENT: FOR PUBLIC STREET.** A city invested by law with the title in fee and the right and control over all public streets, may maintain ejectment for land dedicated for a street. *Ib.*

## DEEDS.

1. **MARRIED WOMAN'S DEED: CORRECTION OF CERTIFICATE OF ACKNOWLEDGMENT.** After a married woman's deed had been delivered, and the officer who certified the acknowledgment had gone out of office, he undertook to correct a defect in the certificate. *Held*, that his act was void for want of power. *Wannall v. Kem*, 51 Mo. 150; s. c., 57 Mo. 478, distinguished. *Gilbraith v. Gallivan*, 452.
2. **CORPORATION ASSIGNMENT: CERTIFICATE OF ACKNOWLEDGMENT.** To an assignment for the benefit of creditors executed by a corporation was appended a notary's certificate that M. C., president, and A. M., cashier, of the corporation, "acknowledged that they executed and delivered the same as their voluntary act and deed, for the uses and purposes therein contained." *Held*, that this was a sufficient certificate that the corporation acknowledged the instrument. *HOUGH, C. J.*, and *HENRY, J.*, dissented. *Eppright v. Nickerson*, 483.
3. **DEED: ERASURE: PRESUMPTION.** The law presumes an erasure in a deed to have been made before its execution, and imposes the burden of proof on him who asserts the contrary. *Burnett v. McCluey*, 676.
4. ———: ———. An erasure or alteration in the description of one of several tracts of land embraced in a deed, made after delivery of a deed, will not affect its validity as a conveyance of the other tracts. *Ib.*
5. ———: SEAL. Where a deed declares that the grantors have affixed their seals, but no seal appears opposite the names of one or more of them, it will be presumed that they adopted those opposite the other names. *Ib.*
6. **MARRIED WOMAN'S DEED: ACKNOWLEDGMENT.** A certificate of acknowledgment to a married woman's deed, made in 1875; *Held*, to be defective because it failed to state that she was made acquainted with the contents of the deed. *Ib.*
7. **SHERIFF'S DEED: ATTACHMENT: EVIDENCE.** A sheriff's deed in attachment proceedings taken without the statutory affidavit is void; and where the record shows no finding that the writ of attachment was duly issued, the court files may be read in evidence to determine whether there was such an affidavit or not, and if none appear, then parol evidence is admissible on the one hand to show that some of the files have been lost or destroyed, and on the other that files alleged to be lost or destroyed, never existed. *Ib.*

8. **DEED: DESCRIPTION: CALL FOR QUANTITY.** A deed described the property conveyed as the "north half of the southwest quarter the southwest quarter of section 6." *Held*, that it should be construed to convey the north half of the southwest quarter of the southwest quarter of section 6, especially as the call for quantity supported this construction. *Ib.*

**DEDICATION OF MARRIED WOMAN'S LAND TO PUBLIC USE.** See the City of Marshall v. Anderson, 85.

**RECORD OF DEEDS.** See Vance v. Corrigan, 94.

**ESSENTIALS OF A CURATOR'S DEED.** See Henry v. McKerlie, 416.

### DEEDS OF TRUST AND MORTGAGES.

1. **RELEASE: MERGER.** Where there were several notes secured by successive deeds of trust on the same land, and two of the notes were devised to the owner of the equity of redemption; *Held*, that although the technical doctrine of merger had no application, yet in the absence of any evidence that the devisee had kept the two notes alive, the devise would be treated as a release and cancellation of them. *Wead v. Gray*, 59.
2. **DEED OF TRUST ON PERSONALTY: VOID AS AGAINST CREDITORS.** A deed of trust to secure a debt described the property as "all and singular the farming implements and tools and live dairy cattle now on the grantor's farm, together with all their increase or substitutes therefor during the lien of this deed, to the value at any time of \$4,000," and again as "a constant and continuous stock of farming implements, tools and live dairy cattle and their increase, of a valuation of at least \$4,000." It also stipulated that the grantor should at all times keep on his farm property of the kind described, "worth on peremptory sale under the provisions hereof at least \$4,000," or, as stated in another place, "at any time in value equal to an appraisalment of \$4,000." No method was provided for having an appraisalment made, and it did not appear but what the implements, tools and cattle on the farm exceeded \$4,000 in value. *Held*, that as against other creditors of the grantor the deed was void, (1) Because by the use of the word "substitutes" it impliedly gave the grantor authority to sell and dispose of the cattle in the ordinary course of business; (2) Because of indefiniteness in the description of the property. *Goddard v. Jones*, 518.

### DESCENTS AND DISTRIBUTION.

1. **GRAND-NEPHEWS.** Under the statute of Descents and Distributions, (R. S. 1879, § 2161,) the children of the deceased nephews and nieces of an intestate, are not cut off from sharing in his estate. *Copenhaver v. Copenhaver*, 56.
2. ——. Under the statute of Descents and Distributions, (R. S. 1879, § 2165,) where nephews and nieces of an intestate inherit from him, together with his grand-nephews and grand-nieces, and



there are none nearer of kin, the former will take in their own right, *per capita*, and the latter by representation, or *per stirpes*. *Ib.*

## DOWER.

**BREACH OF COVENANT AGAINST INCUMBRANCES: DAMAGES.** An inchoate right of dower existing at the date of a deed containing a covenant against incumbrances, and the demand of dower after it becomes consummate, will constitute a breach of such covenant; and the covenantee may by purchase thereafter extinguish the dower and recover a reasonable price paid therefor as damages for such breach. *Ward v. Ashbrook*, 515.

## DRAMSHOPS.

1. "BITTERS:" UNITED STATES GOVERNMENT LICENSE. It is an offense against the Dramshop Act for a person not having a license as a dramshop keeper to sell as a beverage, and not for medicinal purposes, "bitters," compounded in part of intoxicating liquor; and it does not matter that an excise tax has been paid on them to the government of the United States, and that the act of congress does not require one dealing in them to have a license as a liquor dealer. *The State v. Lillard*, 136.
2. DRAMSHOP LICENSES: POLICE POWER: TAXING POWER. The license fee exacted by the general law regulating dramshops and the amendatory act of March 24th, 1883, (Sess. Acts 1883, p. 86, § 3,) is not a tax. It is a price paid for the privilege of carrying on a business which is detrimental to public morals and which the legislature, in the exercise of the police power, has the right to prohibit altogether. The act, therefore, is not void because it does not conform to the restrictions of sections 1, 3 and 10 of article 10 of the constitution in relation to the exercise of the taxing power. *The State ex rel. Troll v. Hudson*, 302.
3. ———: CITY OF ST. LOUIS. The act of 1883 is applicable to the city of St. Louis. *Ib.*
4. ———. Under the act of 1883 it is the duty of the municipal assembly of the city of St. Louis, and of the county courts of the several counties to fix the amount of license fee to be charged under the act within the limits prescribed, and until such action is taken by the municipal assembly or the county court no collector has a right to issue a license to any person as a dramshop keeper. *Ib.*
5. SELLING LIQUOR WITHOUT LICENSE: INDICTMENT. An indictment may charge in a single count a violation both of the dramshop law and of the wine and beer-house license law. *The State v. Klein*, 627.

## EJECTMENT.

1. FOR PUBLIC USE. A city invested by law with the title in fee and the right and control over all public streets, may maintain ejectment for land dedicated for a street. *The City of Marshall v. Anderson*, 85.

- 2 JUDGMENT IN EJECTMENT: ESTOPPEL. Upon a recovery by plaintiff in ejectment, defendant in pursuance of an agreement with the plaintiff turned over to the plaintiff his claims for rent against the tenants in satisfaction of the money portion of the judgment; *Held*, that the judgment and agreement did not estop defendant from maintaining ejectment against plaintiff for the same land. *Prior v. Lambeth*, 538.

JURISDICTION IN EJECTMENT. See *Fields v. Maloney*, 172.

#### EMBEZZLEMENT.

- 1 EMBEZZLEMENT BY PUBLIC OFFICER: SCHOOL FUNDS: STATUTE, CONSTRUCTION OF. Section 41 of article 3, chapter 42, *Wagner's Statutes*, (p. 459,) providing for the punishment of public officers embezzling public funds, was applicable as well to officials whose offices were created after that section became law as to those already existing. It included in its operation the "Township Trustee" provided for by the Township Organization Law of 1873, (Acts 1873, p. 100;) and under it that officer was liable for school funds misappropriated. *The State v. Hays*, 600.
2. INDICTMENT FOR EMBEZZLEMENT BY PUBLIC OFFICER. An indictment against a township trustee charged that he had embezzled "public moneys belonging to the school fund of North township," in Dade county. Strictly speaking the moneys belonged to the sub-districts of North township, rather than the township itself. *Held*, however, that this did not invalidate the indictment. It was sufficient to allege that the funds embezzled were "public moneys," and the amplification in the charge did not vitiate or limit the proof. *Ib.*

#### EMINENT DOMAIN.

1. RAILROADS: BENEFITS TO BE ALLOWED ON ASSESSMENT OF DAMAGES FOR RIGHT OF WAY. The benefits for which a railroad company are entitled to be allowed in estimating the damages sustained by a land owner by reason of the appropriation of his land for the road, are such as the land derives from the location of the road through it, and are not enjoyed by other lands in the same neighborhood. *Combs v. Smith*, 32.
2. ———: CONDEMNATION OF RIGHT OF WAY: MISTAKE. In an action against a railroad company for unlawfully occupying the plaintiff's land, proof that the land was omitted by mistake from the report of the commissioners in a proceeding to condemn a right of way across this and other lands, and that the road was built over the land in controversy with the knowledge and approbation of plaintiff, is not equivalent to proof that the land was included in the condemnation. *Ib.*
3. ESTOPPEL. Whether or not a party is estopped by laches and acquiescence, is a question for the triers of the fact. *Ib.*
4. PUBLIC USE. It sufficiently appears from the record in the present case that there was a judicial determination that the use for which

defendant's land was taken was really a public use. *The City of Kansas v. Knotts*, 356.

## EQUITY.

1. AN EQUITABLE DEFENSE TO A COMMON LAW ACTION will not have the effect of changing such action into a suit in equity. *Carter v. Prior*, 222.
2. EQUITY JURISDICTION OF CROSS-DEMANDS: GENERAL RULES: INSOLVENCY: NON-RESIDENCE. The jurisdiction of equity to afford relief in behalf of a cross-demand in a proper case, is of ancient origin. It existed prior to any statute of set-off; and still exists independent of any such statutes. But courts of equity are often enabled by them, on the well-known principle of following the law, to afford more efficient relief and in a greater variety of cases than before the statute.  
 The relief given depended upon the circumstances of each case, sometimes there would be a decree that the demand of the defendant be applied to the payment and discharge of the demand sued on; sometimes a decree restraining the plaintiff from prosecuting his demand till the defendant had established or failed to establish his cross-demand in a court of law. The moving principle was not so much the inconvenience and circuity of two actions, as the injustice of compelling the defendant to pay the demand against him and take the chances of insolvency of the plaintiff or the plaintiff's assignor. In cases where it was ascertained that the plaintiff was only a nominal owner or assignee without value, the court would decree an offset; but in all such cases there had to be some fact, such as insolvency or non-residence, showing imminent danger of the defendant being compelled to pay without receiving credit for his cross-demand. *Barnes v. McMullins*, 260.
3. —: UNLIQUIDATED CROSS-DEMANDS. Whether this jurisdiction may be exercised in favor of cross-demands at law arising *ex contractu*, or of equitable cross-demands, such as the right to a prospective balance in an unsettled partnership, is discussed but not decided. But in no case will it be exercised in favor of an unliquidated cross-demand *ex delicto* in its nature. Compare *Reppy v. Reppy*, 46 Mo. 571. *Ib.*
4. BONA FIDE PURCHASER. It is a general rule of equity that a purchaser with notice may protect himself by buying the title of a *bona fide* purchaser without notice. *Funkhouser v. Lay*, 458.
5. CASE ADJUDGED. The principal purpose of this suit was to have one of the defendants declared a trustee for plaintiff of certain land lying beyond the limits of this State. The land was subject to a mortgage, the *bona fides* of which was not questioned. Before the trial, without any collusion on the part of this defendant and without any effort on the part of the plaintiff to prevent it, the mortgage was foreclosed, the mortgagee becoming the purchaser. This defendant then died and the suit was revived against her executor. *Held*, that plaintiff was not entitled to have him declared a trustee. *Ib.*

6. **JUDGMENT.** In an action by a judgment creditor against the debtor and a third party to enforce a trust against the latter as a means of obtaining payment of the judgment, it is no error to refuse the plaintiff a new money judgment against the debtor. *Ib.*

**MERGER.** See *Wead v. Gray*, 59.

**EXECUTION CREDITOR AFTER LEVY, A TRUSTEE.** See *Lower v. Buchanan Bank*, 67.

**EQUITIES GROWING OUT OF IRREGULAR ADMINISTRATION SALES.** See *Henry v. McKerlie*, 416.

### ESTOPPEL.

1. **ESTOPPEL.** Whether or not a party is estopped by laches and acquiescence, is a question for the triers of the fact. *Combs v. Smith*, 32.
2. — : **ESTOPPEL IN PAIS.** Where the husband alone files a plat of his wife's land, their joint conveyances thereafter of lots designated on such plat will create no estoppel *in pais* against her, in favor of the public, to assert title to land designated on the plat as a street. *The City of Marshall v. Anderson*, 85.
3. **JUDGMENT IN EJECTMENT: ESTOPPEL.** Upon a recovery by plaintiff in ejectment, defendant in pursuance of an agreement with the plaintiff turned over to the plaintiff his claims for rent against the tenants in satisfaction of the money portion of the judgment; *Held*, that the judgment and agreement did not estop defendant from maintaining ejectment against plaintiff for the same land. *Prior v. Lambeth*, 538.

### EVIDENCE.

1. **NOTARY'S CERTIFICATE.** The certificate of a notary under seal, under the law merchant, was evidence of presentment, refusal and protest; and it is so recognized by our statute, (Wag. Stat., 218, § 20). When it also recites notice of dishonor to the parties, the statute makes it evidence of notice as well as of dishonor, provided it is verified. Wag. Stat., p. 598, § 50. *The First National Bank of Burlington v. Hatch*, 13.
2. **WEIGHT OF EVIDENCE.** Where the evidence upon all the issues made by the pleadings is conflicting, and there is no such preponderance against the finding of the jury, as to warrant the conclusion that it was the result of either passion or prejudice, the Supreme Court will not interfere. *Vautrain v. The St. Louis, Iron Mountain & Southern Railway Company*, 44.
3. **RES GESTAE.** Declarations of the parties to a conflict made after it is over and they have been separated, are not part of the *res gestae*. *The State v. Snell*, 240.

4. ———: EVIDENCE OF CHARACTER. In an action for malicious prosecution, evidence of the general bad reputation of the plaintiff is admissible, in mitigation of damages, if not to aid in making out the defence of probable cause. *Gregory v. Chambers*, 294.
5. LEADING QUESTIONS. It is no error for the trial court to rule out a question which suggests the answer desired, or calls for the opinion of the witness where the jury should form one themselves from the facts. *Ib.*
6. THIS COURT will not reverse a judgment because the jury appear to have disregarded evidence. They may have discredited it. *Ib.*
7. JUDICIAL NOTICE: COAL-OIL. It is not necessary to aver in an indictment nor to prove at the trial, that coal-oil is inflammable. *The State v. Hayes*, 307.
8. ADMISSIONS. An affidavit by defendant for a continuance in a criminal case is competent evidence against him of his admissions therein contained, but the State by using the same for such purpose does not concede the truth of the whole affidavit. *Ib.*
9. WEIGHT OF EVIDENCE. Where proper instructions are given this court will not reverse a judgment because it may think that under the evidence a different verdict might well have been rendered; that is a matter for the jury. *The State v. Thomas*, 327.
10. EVIDENCE OF CHARACTER: PRACTICE. In a case where the testimony is very conflicting, it is a fatal error to permit evidence to be introduced in support of the character of a witness, whose character has not been attacked. *Ib.*
11. MURDER: EVIDENCE, RES GESTAE. The moment after a shot was fired resulting in death, defendant's right hand fell to his side and he struck out with his left at the deceased, when a bystander exclaimed "Don't strike him, for you have shot him now." *Held*, that such exclamation was admissible in evidence as part of the *res gestae*; that it was called out by, and was illustrative of, the affray while still in progress. *The State v. Walker*, 380.
12. ———: EVIDENCE. The failure to repel or deny a direct charge of crime is competent as presumptive evidence of guilt. *Ib.*
13. ———: RES GESTAE. Upon a trial for homicide, the statement of another, when arrested for the crime, that he did not shoot the deceased, and the statements of others that it was the defendant who shot him, are not admissible in evidence as part of the *res gestae*, when not made during the affray. *Ib.*
14. EVIDENCE OF IDENTITY. On questions of identity the impressions and beliefs of a witness are competent evidence. It is also competent to identify a dead body by means of articles found upon it. Circumstantial evidence of identity, which leaves no room for reasonable doubt, is sufficient. *The State v. Dickson*, 438.

15. **MURDER: CORPUS DELICTI: EVIDENCE.** The criminal act and defendant's agency in its production, constitute the *corpus delicti*. The proof thereof need not be by direct and positive evidence, but may be by that which is probable and presumptive, if it be strong and cogent and leave no room for reasonable doubt. *Ib.*
16. ——— : **EVIDENCE: CONCEALMENT.** The concealment of the fact of a homicide is presumptive evidence of crime. *Ib.*
17. ——— : ———. Misrepresentations, to account for the disappearance of one who has been killed, are competent, as presumptive evidence of guilt. *Ib.*
18. ——— : ——— : **ILL-WILL.** Expressions of ill-will and declarations of criminal intention toward one, who shortly afterward is killed, are competent, as presumptive evidence of guilt. *Ib.*
19. **EVIDENCE OF DEFENDANT'S GOOD CHARACTER.** In a criminal prosecution evidence of the good character of the defendant is always admissible; but the law limits the inquiry to his general character as to the trait in issue; a witness will not be allowed to express his individual opinion. *The State v. King*, 555.
20. **PRESUMPTION OF GUILT ARISING FROM FLIGHT.** Flight from a charge of crime raises a presumption of guilt; but this presumption may be modified or overthrown by evidence showing that the flight was occasioned by other causes than consciousness of guilt, and when there is such evidence the jury should be directed to consider it and determine how far it tends to rebut the presumption. *Ib.*
21. **DECLARATIONS OF AN AGENT made one hour after the occurrence to which they related; Held,** no part of the *res gestae*, and not admissible in evidence against his principal. *Aldridge's Adm'r v. The Midland Blast Furnace Company*, 559.

**PAROL EVIDENCE.** See *McQuade v. The City of St. Louis*, 46; *Lash v. Parlin*, 391.

**CONSTITUTIONAL PROHIBITION AGAINST CHANGING THE RULES OF EVIDENCE.** See *Eyerman v. Blaksley*, 145.

**OPINION OF WITNESSES.** See *The State v. Burgess*, 234.

**ORDER OF PROOF.** See *Walthers v. Missouri Pacific Railway Company*, 617.

SEE ALSO PRESUMPTIONS.

WITNESSES.

## EXECUTION.

**CO-SURETIES, RIGHTS OF: EXECUTION, EFFECT OF RELEASE OF LEVY.** Although the statute, (Wag. Stat., p. 370, § 9,) abrogates the common



law rule that the voluntary release of one surety discharges the other, yet where, at the request of one surety, the judgment creditor levies upon property of another, and then releases the levy upon the payment of a portion only of the value of such property, he will be held accountable for its full value upon his attempt to collect the remainder of the debt from the first surety; after the levy, he will be regarded as the trustee of the execution for all parties interested, and will not be permitted to injure them by his release of the levy. *Lower v. The Buchanan Bank*, 67.

## FENCES.

SEE RAILROADS.

## FORGERY.

1. **THE INDICTMENT.** An indictment under section 1399, Revised Statutes 1879, for uttering a forged instrument, need not charge an intent to defraud any particular person. It will be sufficient to charge generally an intent to defraud. *The State v. Phillips*, 49.
2. **THE OFFENSE.** To support such an indictment, it is not necessary to show that the defendant obtained anything of value. The offense consists in uttering with an intent to defraud. *Ib.*

## FRAUD.

1. **FRAUD: JOINT ACTION FOR RELIEF.** Where parties having distinct interests have been made the victims of a fraud, the fact that the fraud was contrived against them all and the same means were used to deceive them all, will not entitle them to maintain a joint action for relief, unless it was through a joint transaction that the fraud was accomplished. *Levering v. Schnell*, 167.
2. ———: **REMEDY, AT LAW AND NOT IN EQUITY.** The petition in this case examined and held to state a case for relief by an action at law for deceit, and not in equity. *Ib.*
3. ———. Fraud may be inferred; but this does not mean that it may be assumed. It can only be legitimately inferred from some tangible, responsible fact in proof. It is a deduction which an intelligent mind may honestly make from the incidents and circumstances surrounding the case, and which appear to be inconsistent with good faith and rectitude on the part of the actor. If, however, his conduct and the transaction under consideration reasonably consist as well with integrity and fair dealing, the law rather refers the act to the better motive. *Funkhouser v. Lay*, 458.
4. ———: **INTERVENTION OF BONA FIDE PURCHASER.** If a fraudulent grantee of the equity of redemption of land covered by a bona fide mortgage buy at the mortgage sale, he will acquire a title free of taint. *Ib.*

5. **CORPORATE UNDERTAKING: LIABILITY OF ASSOCIATES FOR FRAUDULENT MANAGEMENT.** Where several persons engage in business jointly, and, to facilitate such business use a corporate name and issue stock, and, in the promotion of the scheme, false representations are made by those holding themselves out as promoters and managers of the business as to the material facts of inducement and as to matters peculiarly within the knowledge of all the associates or their agents, all those engaged in the promotion of the business as associates of those making the false representations are liable to those who, relying upon such representations, purchase stock to their hurt. *Hornblower v. Crandall*, 581; *Whiting v. Crandall*, 593.
6. ——— : ——— : **INNOCENCE NO PROTECTION, WHEN.** That one of the associates thus connected is ignorant of the details of the business, will not avail him where he had the means of knowing but trusted to his associates, and where he, with the others, received the benefits of the wrong-doing. *Ib.*
7. **LIABILITY FOR FALSE REPRESENTATIONS.** A is responsible for the consequences of false representations made by him to B, and upon which C acted to his loss, where it appears that A intended that they should be communicated to C, and acted upon by him in the manner which occasioned the loss. *Watson v. Crandall*, 583; *Baker v. Crandall*, 584; *Whiting v. Crandall*, 593.
8. **ACTION FOR DECEIT: SURVIVAL.** The right to maintain an action for deceit survives to the legal representatives of the party injured. This is true both under our statute, (R. S. 1879, § 96,) and at common law as modified by the statutes of 4 Edw. III, c. 7, and 31 Edw. III, c. 11. *Ib.*

#### FRAUDULENT CONVEYANCE.

1. **WHAT CONSTITUTES ONE.** If a conveyance is made without consideration, it is void as to existing creditors, without more. As to subsequent creditors it is void if it is made with intent to hinder, delay and defraud them. If it is founded on a valuable consideration, it will be held valid notwithstanding such fraudulent intent, unless the grantee participated therein. *Hurley v. Taylor*, 238.
2. **FRAUDULENT CONVEYANCE.** Land conveyed by an insolvent without valuable consideration, and acquired from the grantee with knowledge of that fact, will be subject in the hands of the purchaser to the demands of the creditors of the insolvent; and, if he exchanges for other land, the latter becomes also subject to their demands. *Sloan v. Torry*, *Terry v. Torry*, 623.

#### GAMING.

**MONEY LOANED FOR GAMING.** Money knowingly loaned for the purpose of being used in betting on a game of chance, and actually so used, cannot be recovered. *Williamson v. Baley*, 636.

## THE GOVERNOR.

**ABSENCE OF GOVERNOR: RIGHT OF LIEUTENANT-GOVERNOR TO ACT.** Temporary absence of the Governor from the State, in the discharge of duties imposed upon him by law, does not of itself authorize the Lieutenant-Governor to assume the functions and receive the salary of the Governor's office during his absence. *The State ex rel. Crittenden v. Walker*, 139.

## HOMESTEAD.

1. **HOMESTEAD: ADMINISTRATOR'S SALE OF, WHEN VALID.** To make a sale of the homestead by an administrator valid, it must appear that the debt for the payment of which it was sold, was contracted before the homestead right attached or was acquired; and the burden of showing this rests on him who claims under the administrator's deed. *Kelsay v. Frazier*, 111.
2. ———: **AN AGREEMENT CONSTRUED.** The widow and heirs of a decedent agreed together as follows: "We hereby obligate ourselves to divide the estate of the deceased, after the payment of all debts and expenses of administration, into three equal parts and each take one-third, in full of all claims and demands against said estate; it being hereby intended by the widow of said deceased, to relinquish all claim of dower, in consideration of the above provision; and, we further agree, if said division cannot be made, in kind, that the property shall be sold by the public administrator of Morgan county, and, after the expenses are paid, the proceeds of such sale divided among us according to our respective interests, as above stated." *Held*, that this was simply an agreement as to how the estate should be divided after the payment of debts, and did not authorize the probate court to have the homestead right of the widow sold for the payment of debts. *Ib.*
3. ———: **DEATH OF WIDOW LEAVING MINOR CHILDREN.** Under the homestead act of 1865, the right of the minor children to hold and enjoy the estate, is not affected by the death of the mother. *Canole v. Hurt*, 649.
4. **CASE IN JUDGMENT: CHILDREN BY SECOND HUSBAND.** Upon the death of J a homestead was set off to M, his widow, and R, their child, a minor. M afterward married H, and died leaving a minor son by H. *Held*, that the death of M did not interrupt the homestead right of R as long as he remained a minor. But on R attaining his majority, he and the son by H would inherit the estate from M as tenants in common. *Ib.*

## HUSBAND AND WIFE.

1. **DEDICATION OF MARRIED WOMAN'S LAND TO PUBLIC USE.** The dedication to public use of the wife's land by the husband will not be effectual even as to his curtesy, unless she join in the conveyance and acknowledge the same in the manner provided by law. *The City of Marshall v. Anderson*, 85.
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2. ——— : ESTOPPEL IN PAIS. Where the husband alone files a plat of his wife's land, their joint conveyances thereafter of lots designated on such plat will create no estoppel in *pais* against her, in favor of the public, to assert title to land designated on the plat as a street. *Ib.*
3. MARRIED WOMAN, ABANDONED BY HUSBAND, MAY SUE ALONE. A married woman may sue as a *femme sole*, in all cases where her husband has abandoned or deserted her, and taken up his abode in another state or jurisdiction. This was the rule of the common law, and the statute has not changed it. 2 Wag. Stat., 1001, § 8; R. S. 1879, § 3468. *Phelps v. Walther*, 320.
4. MARRIED WOMAN'S DEED: CORRECTION OF CERTIFICATE OF ACKNOWLEDGMENT. After a married woman's deed had been delivered, and the officer who certified the acknowledgment had gone out of office, he undertook to correct a defect in the certificate. *Held*, that his act was void for want of power. *Wannall v. Kem*, 51 Mo. 150; *s. c.*, 57 Mo. 478, distinguished. *Gilbraith v. Gallivan*, 452.
5. HUSBAND AND WIFE: WIFE'S PROPERTY. In the absence of evidence that property in the name of a married woman acquired during coverture has been paid for by her separate means, the presumption of law is that it was paid for with those of the husband; and in such case it is not within the protection of the statute, (R. S. 1879, § 3295,) securing to the wife the moneys arising from the sale thereof. *Sloan v. Torry*, 623.
6. ———. The promise of a husband to repay his wife the proceeds of land which belonged to her, but not as her separate estate, and which has been disposed of and used by him with her consent, is without sufficient consideration to make her his creditor. *Ib.*
7. MARRIED WOMAN'S DEED: ACKNOWLEDGMENT. A certificate of acknowledgment to a married woman's deed, made in 1875; *Held*, to be defective because it failed to state that she was made acquainted with the contents of the deed. *Burnett v. McCluey*, 676.

#### INFANTS.

LIABILITY FOR COSTS IN CRIMINAL CASES. A minor filed a complaint before a justice of the peace, charging defendant with disturbing the peace of the family of another, and the trial resulted in a verdict of acquittal; *Held*, under the provisions of the statutes then in force, (2 Wag. Stat., 854, § 12, amended by Acts 1877, p. 281,) that the costs should have been adjudged against the county, on the ground that the informant was not the injured party; but, *Held* further, that if he had been, a judgment against him would not have been obnoxious to objection on the ground of his minority. *The State v. Lavelle*, 104.

#### INJUNCTION.

1. AGAINST TRESPASSES. To maintain injunction against trespass upon property real or personal, it is not necessary that the defendant

should be insolvent or the wrong irreparable. The statute gives the right wherever an adequate remedy cannot be afforded by an action for damages. R. S., § 2722. Thus where the owners of a steamboat were in the constant habit of discharging freight at a private wharf, without the consent and against the protest of the owner of the wharf, thereby seriously interfering with his business of sawing, receiving and delivering lumber and ties, and they threatened to continue this practice; *Held*, that the wharf owner might maintain injunction. *Turner v. Stewart*, 480.

2. **TRESPASS ON REALTY: JURISDICTION: ADMIRALTY.** The State courts have jurisdiction of all trespasses committed upon real estate within the limits of the State. The fact that the real estate in question is a wharf does not make it a matter of admiralty jurisdiction and so cognizable alone in the courts of the United States. *Ib.*
3. **TAXES: INJUNCTION AGAINST COLLECTION.** A petition to restrain the collection of taxes on the ground of excessive valuation showed that the plaintiff, believing all his property to be exempt from taxation, delivered no list to the assessor; but it did not show that the assessor failed to demand a list. *Held*, that it stated no ground for relief. *Meyer v. Rosenblatt*, 495.

#### INN-KEEPERS.

**INN-KEEPER: ACTION FOR INJURY TO GUEST.** The obligation resting upon an inn-keeper to keep his guest safe, is one imposed by law and not growing out of contract, and for violation of it the action is an action on the case for the injury sustained, and not an action for breach of contract. *Stanley v. Bircher*, 245.

#### INSOLVENCY.

**MEANING OF, AS APPLIED TO ESTATE OF A DECEDENT.** See *Bassett v. Elliott's Adm'r*, 625.

#### INSTRUCTIONS.

1. EVIDENCE tending to support a valid defense furnishes a sufficient basis for an instruction applicable to such defense. *Maupin v. The Virginia Lead Mining Company*, 24.
2. In the absence of evidence in the record showing that counsel were surprised; this court will not consider declarations of law offered after the announcement of the decision of the trial court. *Morehouse v. Ware*, 100.
3. An instruction, which is substantially given in another, is for that reason properly refused. *The State v. Jones*, 278.
4. INSTRUCTIONS should be framed solely with reference to the issues made. *Benson v. The Chicago & Alton Railroad Company*, 504.

5. ———. It is not error to refuse one correct instruction if another to the same purport is given. *Condon v. The Missouri Pacific Railway Company*, 567.
6. ———. Where one instruction is given correctly applying a principle to the facts of the case, it is not error to refuse another laying down the principle in a general form. *Ib.*
7. ———. It is not error to refuse an instruction which withdraws an issue of fact from the jury when there is evidence bearing upon the issue. *Ib.*
8. INSTRUCTIONS, unobjectionable as propositions of law, are properly refused, if there is no evidence of the facts upon which they are predicated. *Ib.*

## INSURANCE.

1. FOREIGN INSURANCE COMPANIES: SERVICE OF PROCESS ON THEM: "STATE AGENT." In an action against a foreign insurance company the sheriff returned that he had served the summons on H. P., "state agent" of the company. *Held*, that the words "state agent" sufficiently designated H. P. as the person appointed by the company under section 6013, Revised Statutes 1879, for the purpose of receiving service of process in actions against the company *Stone v. The Travelers Insurance Company*, 655.
2. ———: TO BE SUED, WHERE. Suits against foreign insurance companies are not required to be brought in the county in which the agent appointed under section 6013, Revised Statutes 1879, to receive service of process, resides. They may be brought in any county in the State; and if the agent lives in another county, the writ is to be directed to the sheriff of the latter county. *Ib.*

## INTEREST.

INTEREST cannot be recovered in actions for damage to live stock brought under the 43rd section of the Railroad Law. *Wade v. The Missouri Pacific Railway Company*, 362.

## JUDICIAL NOTICE.

1. JUDICIAL NOTICE: COAL-OIL. It is not necessary to aver in an indictment nor to prove at the trial, that coal-oil is inflammable. *The State v. Hayes*, 307.
2. PLEADING CRIMINAL: TOWNSHIP ORGANIZATION. An indictment against a township officer must aver that the county has adopted township organization. This is a thing of which the courts will not take judicial cognizance, and proof of it will not be received without a proper averment. *The State v. Hays*, 600.



3. **STATUTE LAWS OF SISTER STATES: COMMON LAW.** Judicial notice will not be taken of the statutes of a sister state; and it will not be presumed that the common law is in force in the state of Louisiana. *Sloan v. Torry*, 623.

## JURISDICTION.

1. **CHANGE OF VENUE: JURISDICTION CONFERRED BY: PARTITION: EJECTMENT: AMENDMENT: ERROR APPARENT ON THE FACE OF THE RECORD.** Where an action was brought in Sullivan county for partition of land in that county and for an accounting for rents and profits and use and occupation of the land, and afterward by change of venue the case was sent to Livingston county and by leave of court in that county, an amended petition in ejectment was filed, with a prayer for damages for detention of the premises, and for the monthly value of the rents and profits, and the case was tried on this petition, without objection from the defendant, and judgment rendered for plaintiff; *Held*, (1) That the change of venue vested in the Livingston court jurisdiction, not of the land for all purposes, but of the cause of action set out in the first petition, viz: the suit for partition of the land, and jurisdiction of that only, and consent of the parties could confer no other jurisdiction; (2) That the petition in ejectment was not an amendment of the first petition, but was an abandonment of the cause of action stated in that petition and the substitution of a new cause, and the court acquired no jurisdiction thereof; (3) That under the statute the Livingston court had no original jurisdiction of suits in ejectment for land in Sullivan county; (4) It results that it was error to render judgment for plaintiff on the amended petition, and as the error was apparent on the face of the record, it was fatal, though no exception was taken in the trial court. *Fields v. Maloney*, 172.
  2. **PUBLIC ROADS.** Any step required by the road law to be taken, not being a jurisdictional fact, will be presumed to have been taken, unless it affirmatively appears to have been omitted. *Sutherland v. Holmes*, 396.
- MUST APPEAR AFFIRMATIVELY.** See *The City of St. Louis v. Franks*, 41.

## JURY.

1. **JUROR, HAVING AN OPINION.** The statute provides that an opinion founded only on rumor and newspaper reports, if not such as to prejudice or bias the mind of the juror, shall not disqualify him. R. S. 1879, § 1897. *The State v. Burgess*, 234.
2. ———. A juror said before the trial, that, if defendant was guilty, he ought to be sent up for a year or so. *Held*, not to be an expression of opinion as to defendant's guilt, and standing alone, no ground of challenge for cause: but the attending circumstances, the tone and spirit in which it was said, etc., might make it ground. *The State v. Hayes*, 307.
3. **VERDICT: OATH OF OFFICER IN CHARGE OF JURY.** Although the sheriff was not sworn to keep the jury in some private room and to

hold none but the authorized communications with them, as required by the statute, (R. S. 1879, § 1910,) until one and a half hours after their retirement; *Held*, that their verdict was not vitiated thereby, as it also appeared that they retired to "the jury room," and that he was sworn before holding any communication with them and before their verdict was rendered, and that it could not have been affected by any outside influence occasioned by the failure to take the oath. *Ib.*

#### JUSTICE'S COURTS.

1. **APPEAL FROM JUSTICE'S COURT: ABATEMENT OF ACTION.** The perfecting of an appeal from the judgment of a justice of the peace divests the judgment of its legal effect, and if the case be one in which the cause of action does not survive, upon the death of the party before the entering of a lawful judgment in the appellate court, the action will abate. *The Town of Carrollton v. Rhomberg*, 547.
2. **JURISDICTION: JUSTICE'S COURT: APPEAL.** Jurisdiction of a justice is a question of fact, which cannot be examined on appeal when the record does not show a proper filing of the bill of exceptions. *Campbell v. The Missouri Pacific Railway Company*, 639.
3. **A VOID SUMMONS.** Section 2858 of the Revised Statutes of 1879, provides that the summons, issued by a justice of the peace, shall require the defendant to appear not more than seventy-four days from its date, and shall also state the nature of the suit and the sum demanded; *Held*, that a summons dated June 10th, 1879, requiring defendant to appear before the justice on the 23rd day of June, 1880, and containing no statement of the nature of the suit nor of the sum demanded, was a nullity. *Brandenburg v. Easley*, 659.
4. **THE STATEMENT.** In an action before a justice of the peace the statement is sufficient if it advises the defendant of the nature of the demand against him. *The City of Kansas v. Johnson*, 661.

#### KANSAS CITY.

1. **MERCHANT'S TAX UNDER KANSAS CITY CHARTER.** Under the charter of Kansas City a merchant's liability for the payment of taxes on his goods and wares for a given year, does not depend upon the fact of his being a merchant during the fiscal year beginning on the third Monday of April of that year, but is made to depend upon the fact whether on the 1st day of January of that year, and at any time within three months before such 1st day of January he had on hand as a merchant in said city goods, wares and merchandise. *The City of Kansas v. Johnson*, 661.
2. **—: NOT A TAX FOR PRIVILEGE.** The tax imposed upon a merchant by the charter of Kansas City is not for exercising the privilege of selling goods, but is a tax imposed upon his goods and wares as a merchant, or in other words, a personal tax on the goods of a merchant as distinguished from the personal tax of others. *Ib.*

3. **ATTORNEY'S FEE.** An attorney's fee of ten per cent is expressly authorized under the charter of Kansas City in suits for the collection of taxes. *Ib.*

#### LANDLORD AND TENANT.

**VERBAL AGREEMENT FOR A LEASE.** See *Winters v. Cherry*, 344.

#### LARCENY.

1. **LARCENY: PLEADING, CRIMINAL: JEOPAILS.** An indictment charged the defendant with receiving the goods of one Hale, "before then feloniously stolen, taken and carried away from another;" but omitted to give the name of the person from whom they were stolen. *Held*, that as it did not appear that the defendant was prejudiced by the omission, the objection was not well taken after verdict. *The State v. Honig*, 249.
2. ———: **RECEIVER OF STOLEN GOODS.** One cannot at the same time be a principal in a larceny and in the legal sense a receiver of the stolen property. *Ib.*
3. **AUTREFOIS ACQUIT: LARCENY.** A person tried upon an indictment drawn in two counts, the first charging larceny, the second embezzlement of the same property, was found guilty on the first count and not guilty as to the second, and judgment of discharge entered accordingly. For a fatal defect in the first count the judgment was arrested, and upon another indictment being found for larceny alone, the defendant interposed a plea of *autrefois acquit*. *Held*, not a good plea. *The State v. Owen*, 367.
4. **LARCENY.** An indictment *held* sufficient. *Ib.*
5. **INSTRUCTIONS, in a larceny case, approved.** *Ib.*

#### LIMITATIONS.

1. This action was brought May 16th, 1877, to recover damages for a trespass which the evidence showed was completed in the year 1872, but at what time of the year did not appear. *Held*, that in the face of a finding by the trial court that the action was not barred by the five-year limitation act, this court would not presume that the trespass was completed prior to May 16th, 1872. *Combs v. Smith*, 32.
2. **CUMULATION OF DISABILITIES.** The period of coverture cannot be added to that of minority of the same person in order to prevent the running of the statute of limitations. *Farish v. Cook*, 212.
3. **LIMITATION TO CRIMINAL PROSECUTION.** When an indictment is quashed the time during which it was pending, is not to be computed as a part of the time of the limitation prescribed for the offense. R. S. 1879, § 1707. *The State v. Owen*, 367.

4. **VENDOR'S LIEN: STATUTE OF LIMITATIONS.** Where the vendor has delivered possession to the vendee, but retains the legal title under a contract to deliver a deed when the purchase money is fully paid, the holding of the vendee will not be deemed adverse, and the statute of limitations will not begin to run in his favor until he has made full payment. *Adair v. Adair*, 630.
5. ———: ———: **WAIVER.** In a suit to enforce a vendor's lien upon land, the legal title to which the vendor retained in himself, the vendee pleaded the statute of limitations. He also pleaded that he had made full payment and demanded a deed, but the vendor had refused to deliver one, and prayed for general relief. *Held*, that this latter plea and prayer constituted a waiver of the plea of limitation. *Ib.*

### LIQUOR LICENSE.

SEE DRAMSHOPS.

### MALICIOUS PROSECUTION.

1. **MALICIOUS PROSECUTION: COUNSEL FEES.** In an action for malicious prosecution, the jury, if they find for the plaintiff, may, but they are not bound to allow him counsel fees paid in defending against the prosecution. *Gregory v. Chambers*, 294.
2. ———: **EVIDENCE OF CHARACTER.** In an action for malicious prosecution, evidence of the general bad reputation of the plaintiff is admissible, in mitigation of damages, if not to aid in making out the defense of probable cause. *Ib.*

### MARRIED WOMEN.

SEE HUSBAND AND WIFE.

### MASTER AND SERVANT.

1. **EVIDENCE OF SERVANT'S INCOMPETENCY.** Mere proof of specific acts of carelessness on the part of a servant, without evidence of actual, or reasonably chargeable, knowledge thereof, on the part of the master, is insufficient to warrant a jury in inferring negligence on the part of the master in retaining such servant in his employ. *Huffman v. The Chicago, Rock Island & Pacific Railway Company*, 50.
2. **WHAT RISKS SERVANT ASSUMES: NEGLIGENCE OF MASTER.** A servant by continuing in the business of his master after he becomes aware of defects in appliances furnished him by his master, does not necessarily assume the risk of all injuries which may result from such defects. If the defects grow out of the want of ordinary care and vigilance on the part of the master in providing or maintaining the appliances, and are not so serious but that with care and prudence on the part of the servant they may be safely used, and at the re-

quest of the master he continues to use, and in using them exercises care and prudence, if injury result to him notwithstanding, he may hold the master liable. *Flynn v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 195.

3. ——— : MASTER'S NEGLIGENCE. The liability of a railroad company for an injury sustained by an engineer through a defect in the track existing through the negligence of the company, will not be discharged upon proof that the air brake on the engine was out of order, that the engineer knew this, and that if it had been in order the accident might have been averted. *Ib.*
4. INJURIES TO SERVANT FROM PATENT DANGERS. If a servant knows of the danger in prosecuting his master's work, or if it is so patent that an ordinarily observant man would have seen it, and without any assurance from the master he continues at work, he cannot hold the master liable if injury result to him therefrom. *Aldridge's Adm'r v. The Midland Blast Furnace Company*, 559.
5. FELLOW-SERVANT. A car inspector is not a fellow-servant of the brakeman. *Condon v. The Missouri Pacific Railway Company*, 567.

#### MAXIMS

VALENTI NON FIT INJURIA. See *Robinson v. Musser*, 153.

#### MECHANIC'S LIEN

1. MECHANIC'S LIEN: DESCRIPTION OF LAND: CONSTRUCTION OF "TRUE DESCRIPTION:" "SO NEAR AS TO IDENTIFY THE SAME." To entitle a contractor to a mechanic's lien, the statute, (Wag. Stat., p. 909, § 5,) requires him to file "a true description of the property, or so near as to identify the same, upon which the lien is intended to apply." To maintain a lien on a building situated on a certain acre of ground, fifteen acres were described by their exterior boundary. *Held*, that this was not "a true description of the property or so near as to identify the same" within the statute. *Ranson v. Sheehan*, 668.
2. FAILURE OF DESCRIPTION: NOT CURED BY SUBSEQUENT SURVEY. This failure of description could not be cured by the plaintiff's joining with another lienor, in going, after the suit was brought, upon the land, surveying it, and setting out the exact acre in an amended petition—at least, not as against a third party purchasing the premises. *Oster v. Rabeneau*, 46 Mo. 595, distinguished. *Ib.*
3. LIEN FAILING ON LAND—NOT MAINTAINABLE ON BUILDING. A mechanic's lien cannot be maintained against the building where the lien against the land has failed through an inaccurate description. *Ib.*

#### MERGER

See *Wead v. Gray*, 59.

## MINORS.

SEE INFANTS.

## MISTAKE.

CONDEMNATION OF RIGHT OF WAY: MISTAKE. In an action against a railroad company for unlawfully occupying the plaintiff's land, proof that the land was omitted by mistake from the report of the commissioners in a proceeding to condemn a right of way across this and other lands, and that the road was built over the land in controversy with the knowledge and approbation of plaintiff, is not equivalent to proof that the land was included in the condemnation. *Combs v. Smith*, 22.

## MUNICIPAL CORPORATIONS.

1. FOR PUBLIC USE. A city invested by law with the title in fee and the right and control over all public streets, may maintain ejectment for land dedicated for a street. *The City of Marshall v. Anderson*, 85.
2. ACTION FOR CHANGE OF STREET GRADE: PLEADING. It is a well settled rule in pleading that things which are necessarily implied need not be alleged. On this principle, in an action against a city for negligently changing the grade of a street; *Held*, that an allegation that the city "raised the grade" was equivalent to an allegation that the grade was raised in pursuance of an ordinance, since the city could only act in such matters by ordinance. *Werth v. The City of Springfield*, 107.
3. DAMAGES CAUSED BY PUBLIC WORKS. For damages arising from negligent and unskillful execution of public works on a proper plan adopted by the proper authority, the party injured may maintain an action in the ordinary form; but what his remedy may be where the fault is in the plan itself, is not decided, though it is certain that under the constitution he is entitled to relief. *Ib.*
4. CHANGE OF STREET GRADE: CITY'S LIABILITY THEREFOR. If in changing the grade of a street the city should so negligently perform its work as to practically destroy the street as a highway, it would be liable in damages, while it would not be liable for the simple act of permitting the street to be out of repair, if no special injury ensued therefrom. *Ib.*
5. DANGEROUS SIDEWALK. Without showing special damage a property holder has no right of action against a city for tearing up the sidewalk in front of his premises and re-laying it in a manner dangerous to life and limb. *Ib.*
6. MUNICIPAL CORPORATIONS: POWER TO IMPOSE PENALTIES: SPECIAL TAX BILL. Municipal corporations have power to prescribe reasonable penalties for neglect or refusal to discharge any duty imposed upon a citizen by ordinance. On this principle a charter provision is held valid which allows the holder of a special tax bill



fifteen per cent per annum if payment be not made within six months after demand. *Eyerman v. Blaksley*, 145.

7. PLEADING MUNICIPAL ORDINANCE. A pleading is not defective for not alleging a matter of law. An averment that a tax was "duly levied" is equivalent to pleading the substance of the ordinance under which it was levied, and is sufficient to authorize the reception of the ordinance in evidence. *The City of Kansas v. Johnson*, 661.

SPECIAL TAX BILL: SUIT AGAINST RECORD OWNER: SALE PASSES TRUE TITLE.  
See *Vance v. Corrigan*, 94.

SEE ALSO CARROLLTON.

KANSAS CITY.

ST. LOUIS.

TOWNSHIP ORGANIZATION.

## MURDER.

1. MURDER: MANSLAUGHTER. The evidence in this case warranted the court in instructing the jury both as to murder in the first degree and manslaughter in the second degree. *The State v. Burgess*, 234.
2. INDICTMENT. An indictment for murder examined and *Held* to contain sufficient averments, (1) That the assault, stabbing and wounding were done feloniously, willfully, etc.; (2) That deceased, after being wounded by defendant, "languished till September 29th, 1881, and then and there died" from the effects of the wound. *The State v. Snell*, 240.
3. ———. In an indictment for murder an allegation that the wound was mortal and caused the death is sufficient; it is not necessary to describe it so as to show that it was of a character likely to produce death. *Ib.*
4. "FELONIOUSLY." An erroneous definition of the word "feloniously," *Held* not to be reversible error in this case, it being apparent that the defendant could not have been prejudiced by the error. *Ib.*
5. "PREMEDITATION." The definition of "premeditation" as "thought of beforehand for any length of time however short," adhered to. *Ib.*
6. "DELIBERATION." An incorrect definition of "deliberation," *Held*, not to be reversible error, the defendant not having been convicted of murder in the first degree. *Ib.*
7. INSTRUCTION: DRUNKENNESS. An instruction that drunkenness is no excuse for crime, although there was no occasion for giving it, the defense not having been based upon the defendant's intoxication, *Held*, not to be reversible error, as it could not possibly have prejudiced the defendant. *Ib.*

8. **MANSLAUGHTER.** Where the evidence shows that the offense was either murder of the first or second degree, it is not error to refuse instructions as to manslaughter. *Ib.*
9. **RES GESTAE.** Declarations of the parties to a conflict made after it is over and they have been separated, are not part of the *res gestae*. *Ib.*
10. **REASONABLE DOUBT: SELF-DEFENSE.** An instruction to the effect that, if defendant willfully shot and killed the deceased, and seeks to justify such killing on the ground of self-defense, he must establish the same from the whole evidence to the reasonable satisfaction of the jury, *Held*, not to conflict with the doctrine that, if the jury from a review of the whole case have a reasonable doubt of the defendant's guilt, they should acquit. *The State v. Jones*, 278.
11. **THE COURT APPROVES A SERIES OF INSTRUCTIONS AS TO MURDER.** *The State v. Thomas*, 327.
12. **MURDER: CORPUS DELICTI: EVIDENCE.** The criminal act and defendant's agency in its production, constitute the *corpus delicti*. The proof thereof need not be by direct and positive evidence, but may be by that which is probable and presumptive, if it be strong and cogent and leave no room for reasonable doubt. *The State v. Dickson*, 438.
13. **CASE ADJUDGED.** Defendant was found guilty of murder in the first degree for the killing of one M. upon evidence of the finding of a dead body covered with wounds indicating death by violence, the identification of this body as that of M. by the opinions of witnesses based upon resemblances of clothing, of the color of the hair and beard, and the absence of an upper front tooth, and by means of articles found upon the body, the concealment by defendant of the homicide, and his false statements to account for the disappearance of M. after the killing, his expressions of ill-will and declarations of evil intent toward M. shortly prior to his disappearance; *Held*, that this court would not reverse on the ground of failure of evidence to support the verdict. *Ib.*
14. **MURDER IN THE FIRST DEGREE: INSTRUCTIONS.** Where there is no evidence of any other grade of offense than that of murder in the first degree, it is proper to refuse instructions as to any less grade of homicide. *Ib.*
15. **MURDER BY POISONING.** A homicide by administering poison, with intention of mischief and for an unlawful purpose, knowing it to be dangerous to human life, although without intent to kill, is murder at common law, and under the statute murder in the first degree. *The State v. Wagner*, 644.
16. **FIRST AND SECOND DEGREES.** Under section 1654 of the Revised Statutes of 1879, a person found guilty of murder in the second degree shall be punished according to the verdict, although the evidence shows him to be guilty of murder in the first degree. In such a case the granting of an instruction for murder in the second degree is not reversible error. *Ib.*

## NEGLIGENCE.

1. EVIDENCE OF SERVANT'S INCOMPETENCY. Mere proof of specific acts of carelessness on the part of a servant, without evidence of actual, or reasonably chargeable, knowledge thereof, on the part of the master, is insufficient to warrant a jury in inferring negligence on the part of the master in retaining such servant in his employ. *Huffman v. The Chicago, Rock Island & Pacific Railway Company*, 50.
2. DAMAGES CAUSED BY PUBLIC WORKS. For damages arising from negligent and unskillful execution of public works on a proper plan adopted by the proper authority, the party injured may maintain an action in the ordinary form; but what his remedy may be where the fault is in the plan itself, is not decided, though it is certain that under the constitution he is entitled to relief. *Werth v. The City of Springfield*, 107.
3. CHANGE OF STREET GRADE: CITY'S LIABILITY THEREFOR. If in changing the grade of a street the city should so negligently perform its work as to practically destroy the street as a highway, it would be liable in damages, while it would not be liable for the simple act of permitting the street to be out of repair, if no special injury ensued therefrom. *Ib.*
4. DANGEROUS SIDEWALK. Without showing special damage a property holder has no right of action against a city for tearing up the sidewalk in front of his premises and re-laying it in a manner dangerous to life and limb. *Ib.*
5. PRESUMPTION OF CARE. The law, out of regard to the instinct of self-preservation, presumes that a person who has suffered death by a railroad accident, was at the time of the accident in the exercise of due care, and this presumption is not overthrown by the mere fact of the injury. *Flynn v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 195.
6. WHAT RISKS SERVANT ASSUMES: NEGLIGENCE OF MASTER. A servant by continuing in the business of his master after he becomes aware of defects in appliances furnished him by his master, does not necessarily assume the risk of all injuries which may result from such defects. If the defects grow out of the want of ordinary care and vigilance on the part of the master in providing or maintaining the appliances, and are not so serious but that with care and prudence on the part of the servant they may be safely used, and at the request of the master he continues to use, and in using them exercises care and prudence, if injury result to him notwithstanding, he may hold the master liable. *Ib.*
7. ———: MASTER'S NEGLIGENCE. The liability of a railroad company for an injury sustained by an engineer through a defect in the track existing through the negligence of the company, will not be discharged upon proof that the air brake on the engine was out of order, that the engineer knew this, and that if it had been in order the accident might have been averted. *Ib.*

8. **INJURIES TO SERVANT FROM PATENT DANGERS.** If a servant knows of the danger in prosecuting his master's work, or if it is so patent that an ordinarily observant man would have seen it, and without any assurance from the master he continues at work, he cannot hold the master liable if injury result to him therefrom. *Aldridge's Adm'r v. The Midland Blast Furnace Company*, 559.
9. **NEGLIGENCE: PLEADING.** A petition in an action against a railroad company for personal injuries received in falling from a freight car, stated that the hand-hold on the car "was not safe and sufficient, and by reason of said defectiveness and insufficiency said hand-hold broke." *Held*, that this amounted to an averment that there was a weakness in the fastenings of the hand-hold, in consequence of which it broke, and was a sufficiently specific statement of the negligence intended to be charged. *Condon v. The Missouri Pacific Railway Company*, 567.

**NEGLIGENCE OF RAILROAD TICKET AGENT.** See *Marshall v. The St. Louis, Kansas City & Northern Railway Company*, 610.

#### NEGOTIABLE INSTRUMENTS.

**POWER OF PARTNER TO BIND CO-PARTNERS BY.** See *Deardorf v. Thacher*, 128.

SEE ALSO **BILLS OF EXCHANGE.**

**PROMISSORY NOTES.**

#### NOTARY PUBLIC.

**PROTEST OF NEGOTIABLE PAPER.** See *The First National Bank v. Hatch*, 13.

#### NOTICE.

**OF DISHONOR OF NEGOTIABLE PAPER.** See *The First National Bank v. Hatch*, 13.

#### OFFICES AND OFFICERS.

1. **DURATION OF LIABILITY OF SURETIES ON CONSTABLE'S BOND.** Where by statute a constable's term of office is two years and until his successor is elected and qualified, the liability of the sureties on his bond will continue after the expiration of the two years and until his successor is elected and qualified. *The State ex rel. Bueneman v. Kurtzeborn*, 98.
2. **ABSENCE OF GOVERNOR: RIGHT OF LIEUTENANT-GOVERNOR TO ACT.** Temporary absence of the Governor from the State, in the discharge of duties imposed upon him by law, does not of itself authorize the Lieutenant-Governor to assume the functions and receive the salary

of the Governor's office during his absence. *The State ex rel. Crittenden v. Walker*, 139.

3. OFFICER ACTING IN TWO CAPACITIES. The sheriff of St. Louis county is in virtue of his office required to collect the revenue, but, when he does so, he does not act as sheriff. In a suit brought by him in his capacity of collector, and to his use as such, it was held that the process was properly served by him, as sheriff, and that, under an execution issued upon the judgment in his favor as collector, he properly sold the land and made the deed as sheriff; that, as sheriff, he was not a party to the suit for taxes, and that, as collector, his interest therein was not such as to disqualify him from acting in his capacity as sheriff. *Webster v. Smith*, 163.
4. EMPEZZLEMENT BY PUBLIC OFFICER: SCHOOL FUNDS: STATUTE, CONSTRUCTION OF. Section 41 of article 3, chapter 42, Wagner's Statutes, (p. 459,) providing for the punishment of public officers embezzling public funds, was applicable as well to officials whose offices were created after that section became law as to those already existing. It included in its operation the "Township Trustee" provided for by the Township Organization Law of 1873, (Acts 1873, p. 100;) and under it that officer was liable for school funds misappropriated. *The State v. Hays*, 600.

#### PARENT AND CHILD.

SEE ADOPTION OF CHILDREN.

#### PARTIES.

**JOINT CONTRACT: PARTIES TO SUIT.** All the joint obligees of a bond are necessary parties plaintiff in an action for its breach; one of them cannot be made a co-defendant, upon an allegation in the petition that he refused to join with plaintiffs in the prosecution of the action. Section 3466, Revised Statutes 1879, does not apply to such a case. *McAllen v. Woodcock*, 60 Mo. 174, distinguished. *Ryan v. Riddle*, 521.

#### PASSENGER.

CARRIED BEYOND RAILROAD STATION. See *Marshall v. The St. Louis, Kansas City & Northern Railway Company*, 610.

#### PARTNERSHIP.

1. NON-TRADING PARTNERSHIP: POWER OF MEMBERS TO EXECUTE NOTES. Ordinarily, partners in a non-trading firm have no implied power to bind each other by commercial paper executed in the name of the firm. To make such paper binding, it must be shown either that the making of it was consented to in advance or subsequently ratified by the other partners, or else that from the constitution and particular purposes of the firm the power is necessary or usually exercised.

This rule applied to a firm engaged in the insurance, real estate and collecting business.

*Hickman v. Kunkle*, 27 Mo. 401, overruled. *Deardorf v. Thacher*, 128.

2. PER HENRY, J. One member of a co-partnership, not a trading or mercantile co-partnership, may bind the firm by a note executed in the name of the firm for articles or labor necessary in the business of the firm. *Prima facie* such a note is not binding on the firm. In order to enforce it against them the holder must show that the consideration was articles or labor necessary in the business of the firm or that it was executed with the consent of the other members. *Ib.*
3. ———: LIABILITY OF FIRM FOR NOTES MADE BY A MEMBER. A note given in the name of a firm but not for a debt or by authority of the firm, will never be enforced against the firm at the instance of a person receiving it under circumstances calculated to provoke inquiry as to the authority of the partner executing it to bind his co-partners. *Ib.*
4. PER HOUGH, C. J. The note sued on in this case is not binding upon the other members of the firm (a non-trading firm) because executed in direct violation of the articles of co-partnership. *Ib.*
5. PRIORITIES BETWEEN PARTNERSHIP AND INDIVIDUAL CREDITORS. A creditor of one partner only, as to the separate property of such partner, has no priority over a partnership creditor, where there are no firm assets and the other partners are insolvent. *Shackelford's Adm'r v. Clark*, 491.
6. PARTNERSHIP: NOTE OF INDIVIDUAL, OR FIRM: EVIDENCE. In an action on a note given in the name of a firm, one of the partners pleaded that the note was given by his co-partner for individual purposes and in fraud of the firm, and in support of his plea gave evidence showing that this note was given in lieu of a former individual note of the co-partner. Against his objection the plaintiff was then allowed to show the real consideration of this latter note. *Held*, no error. *Meador v. Malcolm*, 550.
7. ———: ———. Money was borrowed on the credit of a firm and used for the purposes of the firm, but the individual note of one of the partners was given for it, and by mistake of the lender was accepted. Afterward, when the mistake was discovered, the lender demanded and received from that partner the note of the firm in lieu of his own note. *Held*, that this was not the giving of a partnership note for an individual debt, and that the latter note was binding on the firm. *Ib.*

#### PERSONAL INJURIES.

SEE MASTER AND SERVANT.

#### NEGLIGENCE.



## PETROLEUM.

See *The State v. Hayes*, 307.

## PLATS.

See *The City of California v. Howard*, 88.

## PLEADING.

1. **FRAUD: JOINT ACTION FOR RELIEF.** Where parties having distinct interests have been made the victims of a fraud, the fact that the fraud was contrived against them all and the same means were used to deceive them all, will not entitle them to maintain a joint action for relief, unless it was through a joint transaction that the fraud was accomplished. *Levering v. Schnell*, 167.
2. ———: **REMEDY, AT LAW AND NOT IN EQUITY.** The petition in this case examined and held to state a case for relief by an action at law for deceit, and not in equity. *Ib.*
3. **JOINT CONTRACT: PARTIES TO SUIT.** All the joint obligees of a bond are necessary parties plaintiff in an action for its breach; one of them cannot be made a co-defendant, upon an allegation in the petition that he refused to join with plaintiffs in the prosecution of the action. Section 3466, Revised Statutes 1879, does not apply to such a case. *McAllen v. Woodcock*, 60 Mo. 174, distinguished. *Ryan v. Riddle*, 521.
4. **WAIVER OF REPLY.** When the case has been tried as if a reply was on file and the evidence has been closed, the fact that there is no reply will not be taken as an admission of the new matter in the answer. *Meador v. Malcolm*, 550.
5. **PLEADING MATTER OF LAW.** A pleading is not defective for not alleging a matter of law. An averment that a tax was "duly levied" is equivalent to pleading the substance of the ordinance under which it was levied, and is sufficient to authorize the reception of the ordinance in evidence. *The City of Kansas v. Johnson*, 661.

— **IN SUITS ON BILLS OF EXCHANGE.** See *The First National Bank v. Hatch*, 13.

**COMPLAINTS AGAINST RAILROADS FOR KILLING CATTLE.** See *Perrequez v. The Missouri Pacific Railway Company*, 91; *Campbell v. The Missouri Pacific Railway Company*, 639.

— **IN ACTION FOR CHANGE OF STREET GRADE.** See *Werth v. City of Springfield*, 107.

— **EQUITABLE DEFENSES.** See *Henry v. McKerlie*, 416.

— **NEGLIGENCE.** See *Condon v. The Missouri Pacific Railway Company*, 567.

## PLEADING, CRIMINAL.

1. **LARCENY: PLEADING, CRIMINAL: JEOPAILS.** An indictment charged the defendant with receiving the goods of one Hale, "before then feloniously stolen, taken and carried away from another;" but omitted to give the name of the person from whom they were stolen. *Held*, that as it did not appear that the defendant was prejudiced by the omission, the objection was not well taken after verdict. *The State v. Honig*, 249.
2. **DEADLY WEAPONS: PLEADING, CRIMINAL.** Where an indictment charges that accused shot at another with a gun or pistol loaded with powder and leaden balls, or stabbed him with a knife or dagger, it is not necessary that it shall allege that the weapon was a deadly weapon. Such instruments are recognized by the statute as deadly. It is only when other instruments are used that it is necessary to allege their deadly character. *The State v. Hoffman*, 256.
3. **INDICTMENTS.** Indictments are required to conclude "against the peace and dignity of the State." Const., art. 6, § 38. But the addition of the words "of Missouri," will not be ground of objection. *The State v. Hays*, 600.
4. ———. An indictment found before section 1798, Revised Statutes 1879, became the law, was not indorsed "A true bill," nor signed by the foreman of the grand jury, but no objection was made on these grounds till the case reached this court. *Held*, that the defect was cured. *Ib.*
5. **PLEADING CRIMINAL: TOWNSHIP ORGANIZATION.** An indictment against a township officer must aver that the county has adopted township organization. This is a thing of which the courts will not take judicial cognizance, and proof of it will not be received without a proper averment. *Ib.*

**INDICTMENT AGAINST PUBLIC OFFICER FOR EMBEZZLEMENT.** See *The State v. Hays*, 600.

## POLICE POWER.

1. **POLICE REGULATIONS.** A law regulating the mode of voting at corporation elections, cannot be called a police regulation. *The State ex rel. Haeussler v. Greer*, 188.
2. **DRAMSHOP LICENSES: POLICE POWER: TAXING POWER.** The license fee exacted by the general law regulating dramshops and the amendatory act of March 24th, 1883, (Sess. Acts 1883, p. 86, § 3,) is not a tax. It is a price paid for the privilege of carrying on a business which is detrimental to public morals and which the legislature, in the exercise of the police power, has the right to prohibit altogether. The act, therefore, is not void because it does not conform to the restrictions of sections 1, 3 and 10 of article 10 of the constitution in relation to the exercise of the taxing power. *The State ex rel. Troll v. Hudson*, 302.

## PRACTICE.

1. **THE decree must always conform with the pleadings and proofs.** *Baldwin v. Whaley*, 186.
2. **PRACTICE: SPECIAL JUDGE: WAIVER.** An objection made for the first time in the appellate court that the attorney, agreed upon by the parties to act as judge in the trial of the cause, did not before doing so take the requisite oath, will be disregarded. *Carter v. Prior*, 222.
3. **A BILL OF EXCEPTIONS** may be signed and filed as well after as before the allowance of the appeal, following *State v. Dodson*, 72 Mo. 283, and overruling *State v. Musick*, 7 Mo. App. 597. *Ib.*
4. **A BILL OF EXCEPTIONS**, presented and filed in vacation, requires the consent of both parties and the concurrence of the court expressed on the record; a mere stipulation between the parties will not answer. *Ib.*
5. **THE FILING OF A BILL OF EXCEPTIONS**, if in term time, must be proven by the record, if in vacation, by the indorsement thereon of the filing of such bill by the clerk. *Ib.*
6. **AN EQUITABLE DEFENSE TO A COMMON LAW ACTION** will not have the effect of changing such action into a suit in equity. *Ib.*
7. **FINDING OF TRIAL COURT.** The trial of the issue made on a petition for a change of venue, is by the court, and unless manifest error occur to the prejudice of the accused, the appellate court will not interfere with the finding. *The State v. Burgess*, 234.
8. **OPINIONS OF WITNESSES.** Upon the trial of this issue it is error to take the opinions of witnesses as to whether the applicant can have a fair trial or not. They should be interrogated as to facts tending to show whether there is or is not prejudice. But if there is enough other evidence to support the finding of the court, the judgment will not be reversed for error in this particular. *Ib.*
9. **EXCEPTIONS.** Where the bill of exceptions shows that the appellant declined further to appear or participate in the trial, this court cannot consider objections which purport to have been subsequently taken at the trial. *Barnes v. McMullins*, 260.
10. **MARRIED WOMAN, ABANDONED BY HUSBAND, MAY SUE ALONE.** A married woman may sue as a *femme sole*, in all cases where her husband has abandoned or deserted her, and taken up his abode in another state or jurisdiction. This was the rule of the common law, and the statute has not changed it. 2 Wag. Stat., 1001, § 8; R. S. 1879, § 3468. *Phelps v. Walther*, 320.
11. **WEIGHT OF EVIDENCE.** Where proper instructions are given this court will not reverse a judgment because it may think that under the evidence a different verdict might well have been rendered; that is a matter for the jury. *The State v. Thomas*, 327.

12. **EVIDENCE OF CHARACTER: PRACTICE.** In a case where the testimony is very conflicting, it is a fatal error to permit evidence to be introduced in support of the character of a witness, whose character has not been attacked. *Ib.*
13. **JUDGE A PARTY TO THE RECORD.** Where the circuit court consists of two judges sitting separately, (as in Jackson county,) if both happen to be parties to the record of a cause, it is not error for the one before whom the cause comes in the ordinary course to refuse to send it to the other for trial. *The City of Kansas v. Knotts*, 356.
14. ———. A judge who is a party to the record cannot sit in the case even by consent of parties. The statute which authorizes a judge "who is interested in any suit" to try it, if the parties consent, has no application to such a case. R. S., § 1041. *Ib.*
15. **JUDGMENT.** In an action by a judgment creditor against the debtor and a third party to enforce a trust against the latter as a means of obtaining payment of the judgment, it is no error to refuse the plaintiff a new money judgment against the debtor. *Funkhouser v. Lay*, 458.
16. **RE-TAXATION OF COSTS.** The court may, upon notice, correct an error in the taxation of costs after the lapse of the judgment term and after the judgment and costs as first taxed have been paid. *The State ex rel. Clinton County v. The Hannibal & St. Joseph Railroad Company*, 575.
17. **PRACTICE: AMENDMENT: JUSTICE'S COURT.** The circuit court, on appeal from a justice, may allow the constable to amend his return on the summons, according to the fact, so as to show proper service on the defendant. *Turner v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 578.
18. **INFORMAL RECORD.** Where the record entries sufficiently show that the judgment is made to follow a confirmation of the referee's report, that there was an informality in making up the record, which could work no injury to the appellant, is not a ground for reversing the judgment. *Hornblower v. Crandall*, 581.
19. **REFEREE'S FINDING: WEIGHT OF EVIDENCE.** An objection that the finding of a referee is against the weight of evidence can be raised only in the trial court, and is properly raised there only by specifying the particular findings objected to and the distinct grounds of objection. *Ib.*
20. **WHILE** the trial issues must be within the paper issues, they may be less. *Ib.*
21. **DEATH OF PARTY: REVIVAL OF ACTION: WAIVER.** A party died during the pendency of a cause. His death was suggested, and without a formal order of revival his administrator appeared and the cause proceeded in the name of the administrator. The adverse party participated in the proceedings and never objected to the want of such an order till the cause reached this court. *Held*, that

the objection then came too late. *The Town of Carrollton v. Rhombert, 547.*

22. ACTION AGAINST CORPORATION: IRREGULAR SUMMONS: AMENDMENT. In an action against a corporation the writ commanded the officer to summon "the proper officer of" the corporation to appear. Pending a motion to quash on the ground that the writ did not require the corporation but only its officer to appear, the court granted leave to amend by striking out the words here quoted. *Held*, that this was proper; and although it did not certainly appear that the amendment had actually been made, this court would treat it as if it had been. *Stone v. The Travelers Insurance Company, 655.*
23. JUDGMENT FOR MORE THAN DEMANDED. The amount of tax due at the time of beginning suit being stated, the law fixes the interest and costs to be added when judgment is rendered. Hence, it is no objection to a judgment for taxes that it is for a greater amount than is sued for, the amount being in such case a matter of law and not of fact. *The City of Kansas v. Johnson, 661.*

FOREIGN INSURANCE COMPANIES: SERVICE OF PROCESS ON THEM: WHERE TO BE SUED. See *Stone v. The Travelers Insurance Company, 655.*

#### PRACTICE, CRIMINAL.

1. OPENING AND CONCLUDING ARGUMENTS. The provision of the Criminal Practice Act that "unless the case be submitted without argument, the counsel for the prosecution shall make the opening argument, the counsel for the defendant shall follow, and the counsel for the prosecution shall conclude," is mandatory. The prosecuting counsel must not be allowed to make the concluding unless he also makes the opening argument. *The State v. Honig, 249.*
2. PROSECUTING ATTORNEY'S REMARKS. Certain remarks of the prosecuting attorney complained of as being unsupported by the evidence; *Held*, not open to this objection. *The State v. Hoffman, 256.*
3. RIGHT OF ACCUSED TO BE PRESENT IN COURT. The accused has the right to be present when his motion for new trial is heard. To refuse his counsel's request to have him brought into court for that purpose, is error requiring reversal of a judgment of conviction. *Sherwood and Norton, JJ., dissented. Ib.*
4. VERDICT: OATH OF OFFICER IN CHARGE OF JURY. Although the sheriff was not sworn to keep the jury in some private room and to hold none but the authorized communications with them, as required by the statute, (R. S. 1879, § 1910,) until one and a half hours after their retirement; *Held*, that their verdict was not vitiated thereby, as it also appeared that they retired to "the jury room," and that he was sworn before holding any communication with them and before their verdict was rendered, and that it could not have been affected by any outside influence occasioned by the failure to take the oath. *The State v. Hayes, 307.*
5. THE COURT declines to construe an obscure order of *nolle prosequi* found in the record as referring to the indictment on which the de-

defendant was tried, it appearing that he had been before tried on an indictment which had, upon motion in arrest, been held bad. *The State v. Owen*, 367.

6. **DEFENDANT AS A WITNESS.** A defendant voluntarily testifying in his own behalf, is amenable to the usual rules governing the cross-examination of witnesses. R. S. 1879, § 1918. See *State v. Turner*, 76 Mo. 350; *State v. Porter*, 75 Mo. 171. *Ib.*
7. **HARMLESS ERROR IN RULING ON EVIDENCE.** Where the defendant on the witness stand virtually admits his guilt, and besides it is clearly established by his confessions made out of court, and by other evidence, error in admitting further evidence will not warrant reversal of the judgment. *HOUGH*, C. J., and *HENRY*, J., dissent. *Ib.*
8. **REMARKS of the prosecuting attorney in this case, if improper, do not require reversal of the judgment.** *Ib.*
9. **AN INSTRUCTION objected to as leaving it to the jury to determine what were the material allegations in the indictment; Held, not properly open to that objection.** *The State v. King*, 555.
10. **NEGLECT OF OFFICER IN CHARGE OF JURY TO BE SWORN.** In the absence of evidence that either the officer in charge of the jury or any one else had any communication with the jury, the verdict should not be set aside because the officer did not take the special oath required by section 1910, Revised Statutes 1879. *The State v. Hays*, 600.
11. **—: VERDICT.** Failure of the jury to find on all the counts of the indictment does not vitiate the verdict. It operates an acquittal as to the omitted counts. *Ib.*
12. **MULTIFARIOUSNESS.** The objection that an indictment is multifarious, must be raised by motion before trial. *The State v. Klein*, 627.

#### PRACTICE IN THE SUPREME COURT.

1. **PRESUMPTION IN FAVOR OF JUDGMENT BELOW.** The record did not contain the instructions given on behalf of the plaintiff: *Held* that, in their absence, it was impossible to determine whether or not error had been committed in refusing those asked by the defendant; and that, in such case, the presumption would be in favor of the propriety of the action of the trial court. *Birney v. Sharp*, 73; *Combs v. Smith*, 32.
2. **—: IMMATERIAL EVIDENCE: WEIGHT OF EVIDENCE.** The Supreme Court will not reverse because of the admission of incompetent evidence where it is seen to be immaterial; and, where there is evidence to support the verdict, will not disturb the same upon the mere weight of evidence. *Ib.*
3. **APPEAL FROM ST. LOUIS COURT OF APPEALS.** In a case in which an appeal lies from the St. Louis court of appeals only because constitutional questions are involved, this court will consider those questions only. *Eyerman v. Blaksley*, 145.



4. **FINDINGS OF THE TRIAL COURT.** Even in equity cases, the Supreme Court deems the conclusions of the trial court upon issues of fact entitled to consideration where such court and a jury, with the witnesses before them, have successively reached the same conclusions. *Royle v. Jones*, 403.
5. **REVERSIBLE ERROR.** No judgment should be reversed unless there is error materially affecting the merits of the action. *The State ex rel. Griggs v. Edwards*, 473.
6. **EXCESSIVE VERDICT.** Where the verdict is manifestly excessive in amount, this court will reverse the judgment. *Benson v. The Chicago & Alton Railroad Company*, 504; *Marshall v. The St. Louis, Kansas City & Northern Railway Company*, 610.
7. **JURISDICTION: JUSTICE'S COURT: APPEAL.** Jurisdiction of a justice is a question of fact, which cannot be examined on appeal when the record does not show a proper filing of the bill of exceptions. *Campbell v. The Missouri Pacific Railway Company*, 639.
8. **THIS COURT CANNOT ACT UPON A CONJECTURE THAT A DATE APPEARING IN THE RECORD IS ERRONEOUSLY GIVEN.** *Brandenburger v. Easley*, 659.

**ERROR APPARENT ON THE FACE OF THE RECORD.** See *Fields v. Maloney*, 172.

#### PRESUMPTION.

**AS TO ERASURE IN DEED.** The law presumes an erasure in a deed to have been made before its execution, and imposes the burden of proof on him who asserts the contrary. *Burnett v. McCluey*, 676.

—— **IN FAVOR OF JUDGMENT BELOW.** See *Combs v. Smith*, 32; *Birney v. Sharp*, 73.

—— **OF DUE CARE.** See *Flynn v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 195.

—— **AS TO INTESTACY.** See *Farish v. Cook*, 212.

—— **OF GUILT, ARISING FROM FLIGHT.** See *The State v. King*, 555.

—— **AS TO LAND HELD IN WIFE'S NAME.** See *Sloan v. Torrey*, 623.

#### PRINCIPAL AND AGENT.

**DECLARATIONS OF AN AGENT** made one hour after the occurrence to which they related; *Held*, no part of the *res gestae*, and not admissible in evidence against his principal. *Aldridge's Adm'r v. The Midland Blast Furnace Company*, 559.

## PRINCIPAL AND SURETY.

- 1 CO-SURETIES, RIGHTS OF: EXECUTION, EFFECT OF RELEASE OF LEVY. Although the statute, (Wag. Stat., p. 370, § 9,) abrogates the common law rule that the voluntary release of one surety discharges the other, yet where, at the request of one surety, the judgment creditor levies upon property of another, and then releases the levy upon the payment of a portion only of the value of such property, he will be held accountable for its full value upon his attempt to collect the remainder of the debt from the first surety; after the levy, he will be regarded as the trustee of the execution for all parties interested, and will not be permitted to injure them by his release of the levy. *Lower v. The Buchanan Bank*, 67.
- 2 DURATION OF LIABILITY OF SURETIES ON CONSTABLE'S BOND. Where by statute a constable's term of office is two years and until his successor is elected and qualified, the liability of the sureties on his bond will continue after the expiration of the two years and until his successor is elected and qualified. *The State ex rel. Buenenon v. Kurtzborn*, 98.

## PROCESS.

OFFICER ACTING IN TWO CAPACITIES. The sheriff of St. Louis county is in virtue of his office required to collect the revenue, but, when he does so, he does not act as sheriff. In a suit brought by him in his capacity of collector, and to his use as such, it was held that the process was properly served by him, as sheriff, and that, under an execution issued upon the judgment in his favor as collector, he properly sold the land and made the deed as sheriff; that, as sheriff, he was not a party to the suit for taxes, and that, as collector, his interest therein was not such as to disqualify him from acting in his capacity as sheriff. *Webster v. Smith*, 163.

## PROMISSORY NOTES.

1. NEGOTIABLE PAPER: TRANSFER AFTER MATURITY: COUNTER-CLAIM: OFFSET. In this State, when a negotiable note is indorsed or transferred after maturity, the right of offset or counter-claim on an independent contract does not follow it in the hands of the assignee. We adhere to the English rule that only such equities follow it as arise out of or inhere in it, and that the assignee takes it divested of all rights and claims arising out of independent transactions. See *Cutler v. Cook*, 77 Mo. 388. *Barnes v. McMullins*, 260.
2. DAMAGES IN LIEU OF PROTEST CHARGES. The damages allowed by statute in lieu of charges for protest, etc., are to be computed on the principal sum specified in the note, not on the principal and interest. *Id.*

ALTERATION OF. See *Morrison v. Garth*, 434.

## RAILROADS.

1. **RAILROADS: BENEFITS TO BE ALLOWED ON ASSESSMENT OF DAMAGES FOR RIGHT OF WAY.** The benefits for which a railroad company are entitled to be allowed in estimating the damages sustained by a land owner by reason of the appropriation of his land for the road, are such as the land derives from the location of the road through it, and are not enjoyed by other lands in the same neighborhood. *Combs v. Smith*, 32.
2. **CONDEMNATION OF RIGHT OF WAY: MISTAKE.** In an action against a railroad company for unlawfully occupying the plaintiff's land, proof that the land was omitted by mistake from the report of the commissioners in a proceeding to condemn a right of way across this and other lands, and that the road was built over the land in controversy with the knowledge and approbation of plaintiff, is not equivalent to proof that the land was included in the condemnation. *Ib.*
3. **KILLING CATTLE: COMPLAINT.** In an action under the 43rd section of the Railroad Law, (R. S. 1879, § 809,) the complaint should negative any reasonable inference that the injury complained of may have occurred at a point where the law does not impose any obligation on the company to fence; but it need go no further. Thus it need not be expressly averred that the place where the animal entered on the road was not within the limits of an incorporated town or city; an averment that it was at a point where the road runs along or adjoining uninclosed fields, will be sufficient. *Perrequez v. The Missouri Pacific Railway Company*, 92.
4. ———: ———. The complaint in such an action alleged that plaintiff's cow "was crippled and got on the railroad at a point where the same runs along or adjoining uninclosed fields and lands, and where the same was not fenced with a good and lawful fence, and not at the crossing of any public highway." *Held*, that this sufficiently showed that the injury resulted from the company's failure to build a fence. *Ib.*
5. **RAILROADS: THEIR DUTY TO FENCE.** A county road ran parallel with and immediately adjoining the right of way of a railroad company, where the latter passed through uninclosed prairie lands. *Held*, that this did not exempt the company from the duty to fence imposed by the 43rd section of the Railroad Law. R. S. 1879, § 809. *Rutledge v. The Hannibal & St. Joseph Railroad Company*, 286.
6. ———: ———: **ORDINARY CARE.** Under this section, a railroad company is not chargeable as an absolute insurer of its fences, but with the exercise of ordinary care, only, in keeping them in repair. Ordinary care, however, is a relative term, to be measured by the nature of the case, the hazard and the situation. In keeping up its fences, the care required of a railroad company is not limited to such as would be used and exercised by an ordinarily careful farmer. *Ib.*
7. **DAMAGE TO LIVE STOCK: COMPLAINT.** The complaint in this case, (an action under the 43rd section of the Railroad Law for double damages to live stock,) does by implication, though not expressly,

negative the possibility that the animal was killed at a public crossing or within the corporate limits of a town or city. The averment is, that it was killed at "a certain point of uninclosed timber land." *Wade v. The Missouri Pacific Railway Company*, 362.

8. THE complaint also contained an averment that the animal came upon the track and was killed at a place which the law required the company to protect with a fence or cattle-guard. *Held*, that on this ground also it was sufficient. *Ib.*
9. ——— : ——— : PLACE OF KILLING. The complaint alleged that the animal was killed in Jefferson township. The case was first tried before a justice of that township. The instructions in the circuit court told the jury that they could not find for plaintiff if the animal was not killed in that township. There was no evidence in the record to show where the killing occurred; but it did not satisfactorily appear that all the evidence was preserved. *Held*, that this court would presume that the killing had been shown to have taken place in Jefferson township. *Ib.*
10. ——— : ——— : INTEREST: HARMLESS ERROR IN INSTRUCTION. In an action under the 43rd section the court instructed the jury that they might, in addition to double damages, allow the plaintiff interest; but it sufficiently appeared that no interest had been allowed. *Held*, that the instruction was erroneous, but as the defendant had not been prejudiced, the error was immaterial. *Ib.*
11. RAILROADS: EASEMENT: FLOODING ADJACENT LAND. The grant of a right of way to a railroad company carries with it the right to make the necessary embankments, culverts and ditches, for the proper grade and protection of the road; and if in exercising this right with due care and skill the flow of surface water from adjoining land of the grantors is obstructed, it is *damnum absque injuria*. *Benson v. The Chicago & Alton Railroad Company*, 504.
12. RAILROADS: FENCES: KILLING STOCK: TRESPASS OF STOCK. Under section 809, Revised Statutes 1879, the obligation of a railroad company to fence its road, is not postponed until the completion of the road and the running of cars thereon for the carriage of freight and passengers for hire. Although one of the objects of the statute be the security of passengers and employes in transit, its primary object is to prevent the killing of stock and their trespasses upon adjoining fields: and when the necessity for such protection to the owners of land and stock begins, then the obligation to fence attaches; and the company will be liable for the damages caused by its failure to fence, after a reasonable time for the erection of fences has elapsed. *Silver v. The Kansas City, St. Louis & Chicago Railroad Company*, 528.
13. CONTRACT TO SHIFT STATUTE DUTY. The liability of a railroad company for failure to erect fences on the sides of its road under the statute, cannot be defeated by its contract with another person to erect such fences. *Ib.*
14. FELLOW-SERVANT. A car inspector is not a fellow-servant of the brakeman. *Condon v. The Missouri Pacific Railway Company*, 567.

15. RAILROADS: SIGNALS. Section 38 of the Railroad Law, (Wag. Stat., p. 310,) does not require both the ringing of the bell and the sounding of the whistle when a train approaches a public crossing. Either will suffice. *Turner v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 578.
16. ———: STOCK RUNNING AT LARGE: CONTRIBUTORY NEGLIGENCE. It is no defense to an action under section 38 for killing stock, that the plaintiff allowed his animals to run at large upon the highway near the railroad. *Ib.*
17. ———: FAILURE TO GIVE SIGNALS. If the company fails to give the signal required by section 38, and stock is killed or injured, which is in such a condition or situation that if the signal had been given it might have escaped, this constitutes a *prima facie* case against the company. *Ib.*
18. ACTION BY PASSENGER FOR BEING CARRIED BEYOND STATION: EXCESSIVE VERDICT. In an action against a railroad company for carrying a female passenger beyond her station, the circumstances were such that the plaintiff was only entitled to recover for the loss of time and expense incurred in being taken past her station and back, and the jury were so instructed. The evidence showed that she lost two or three hours' time and paid \$1.50 for a returning conveyance. There was a verdict for \$1,000, reduced by remittitur to \$750, and judgment accordingly. *Held*, excessive, and judgment reversed. *Marshall v. The St. Louis, Kansas City & Northern Railway Company*, 610.
19. ———: EXPRESS TRAIN NOT STOPPING AT WAY-STATION. A passenger buying a ticket to D. station on defendant's road, was told by the ticket agent to take a particular train. She did accordingly. The train proved to be an express, not allowed by the regulations of the company to stop at D., but she did not know this until informed of it by the conductor after the train had started. She told him of the direction the agent had given her, and insisted on being let off at D. He took up her ticket, but refused to stop at D., and took her to the next stopping place beyond. In an action against the company; *Held*, that the plaintiff ought to have counted on the negligent misdirection of the ticket agent, not on the refusal of the conductor to stop, for he could not have done otherwise. *Ib.*
20. RAILROADS: KILLING STOCK; ORDER OF PROOF. In an action under the double damage act for killing stock, evidence offered by the plaintiff of the condition of the fencing at the point where the stock was killed, and which also furnished circumstances from which a reasonable inference could be drawn that such stock had there entered upon the railroad track; *Held*, admissible and properly submitted to the jury; *Held*, also, that proof of the condition of the fencing at a particular point was, in the discretion of the court, properly admitted before proof, or an offer to prove, that such stock entered upon the railroad at that point. *Walters v. The Missouri Pacific Railway Company*, 617.
21. ———: ———: FENCES. Where a railroad company erects and uses diligent effort to maintain its fences, but strangers throw them down, it will not be liable for the killing of stock which enter upon its track through the breach. *Ib.*

22. **DOUBLE DAMAGE ACT: KILLING STOCK: PLEADING.** In an action under the statute against a railroad company for double damages for killing stock, the complaint need not specifically allege that the injury was occasioned by the failure to fence or to maintain cattle-guards, or that the injury was not within the limits of an incorporated city or town. It is sufficient if these facts may be inferred from the allegations of the complaint. *Campbell v. The Missouri Pacific Railway Company*, 639.

**SCHOOL TAXES ON RAILROAD PROPERTY.** See *In the Matter of the Apportionment of Taxes*, 596.

#### RAPE.

**VOLENTI NON FIT INJURIA.** The maxim applied in a civil action for rape. *Robinson v. Musser*, 153.

#### RATIFICATION.

**CONSIDERATION.** No new consideration is necessary to uphold a subsequent ratification of an unauthorized award. *Ellison v. Weathers*, 115.

#### RECEIVER.

**RECEIVER: HIS LIABILITY FOR TORTS.** An action may be maintained against the receiver of a corporation for a tort committed by the corporation before his appointment. The judgment, if for the plaintiff, will be against him in his capacity as receiver, and is leviable out of the assets in his hands. *Combs v. Smith*, 32.

#### RECORD OF DEEDS.

**SPECIAL TAX BILL: SUIT AGAINST RECORD OWNER: SALE PASSES TITLE OF TRUE OWNER.** Where the statute under which a special tax bill was issued required the suit for its enforcement to be brought against "the owner" of the land to be charged; *Held*, that in the absence of any knowledge or notice to the contrary, the holder of the bill had the right to assume that the person in whom the records showed the title to be vested, was the true owner, and to sue accordingly; and that a sale under execution upon a judgment against the record owner passed the title as against the grantee in an unrecorded deed from him, provided the purchaser had no notice of the unrecorded deed. *Vance v. Corrigan*, 94.

#### RELATION.

**THE DOCTRINE HELD INAPPLICABLE.** See *Prior v. Lambeth*, 538.



## ROADS.

- 1 **PUBLIC ROADS: PETITION FOR OPENING.** A petition for the opening of a new road need not show in express terms that the road will be in the county where the proceedings are had. If it defines the location by reference to government surveys, to the names of persons and farms to be touched, and intersections with other known highways in the county, it will be sufficient. *Sutherland v. Holmes*, 399.
- 2 ———: **NOTICE OF PROCEEDINGS.** The road law requires notice to be given of the presentation of a petition for the opening of a new road; but does not require copies of the petition to be posted. If, however, such copies are posted, the law will be complied with. *Ib.*
- 3 ———. It is not error for the circuit court, on appeal from an order of the county court establishing a new road, to permit one of the viewers to testify that no one was present when the view was taken, and that no witnesses were examined. *Ib.*
- 4 ———: **OATH OF COMMISSIONERS.** Even if the law as it stood in 1877 required the viewers to take an oath, it was not necessary that it should be taken in advance. If their report was made under oath it was sufficient. *Ib.*
- 5 ———. Any step required by the road law to be taken, not being a jurisdictional fact, will be presumed to have been taken, unless it affirmatively appears to have been omitted. *Ib.*
- 6 ———: **APPEAL TO CIRCUIT COURT.** Under the road law of 1877 a party dissatisfied with an order of the county court establishing a road might appeal from the whole order or only from the assessment of damages. If he limited his appeal to the latter, the circuit court had only to do with that and was not bound to inquire whether the requisite number of petitioners had signed, the requisite notice been given, etc. *Ib.*

## ST. LOUIS.

1. **OPENING OF STREETS.** The city charter provides that "no street shall be extended nearer than 500 feet to a street already opened, where the street runs north and south, except on the unanimous recommendation of the Board of Public Improvements." *Held*, that the unanimous recommendation of the board is in the nature of a jurisdictional fact without which the municipal assembly has no power to order the extension of a north and south street nearer than 500 feet to a street already opened, and without affirmative proof of which for such an extension aimed. *The City of St. Louis v. Franks*, 41.
2. **CONTRACT FOR CITY WORK: NEED NOT BE IN WRITING: PAROL EVIDENCE.** An ordinance of the city provided that no one should have power to create any liability on account of the Board of Park Commissioners except with the express authority of the board. By resolution of the board, a committee consisting of the president and two other persons were authorized to contract for certain work, "and to report." In an action on a written contract for the work signed

by the president alone for the board; *Held*, that there being no law or ordinance requiring the contract to be in writing, parol evidence was admissible to show that the other members of the committee assented to the making of the contract. *Held* also, that as it did not appear that the contract was to be reported for approval or rejection by the board, failure of the committee to report it did not affect the rights of the contractor. *McQuade v. The City of St. Louis*, 46.

- 3 SEWER ORDINANCES IN ST. LOUIS. There is nothing in section 22, article 6 of the charter of the city of St. Louis which makes it necessary that a sewer district shall be established by ordinance before the Board of Public Improvements can recommend or the Municipal Assembly can pass an ordinance for the construction of a sewer in such district. Hence, where the board recommended the passage of an ordinance for the construction of a sewer while the ordinance for the establishment of the district it was intended to drain was pending, and the two ordinances were passed and approved on the same day; *Held*, that the former ordinance was valid. *Eyerman v. Blaksley*, 145.
4. ———. Nor does said section make it the duty of the Board of Public Improvements in recommending the construction of a sewer to state specifically the reason for the recommendation. A declaration that it is made "in accordance with the provisions of the charter," is sufficient. *Ib.*
5. ———: DISTRICT SEWERS. The requirement of said section that every district sewer shall connect with a public sewer or some natural course of drainage, is sufficiently complied with if connection is made with another district sewer already constructed, of sufficient capacity and itself connecting with a public sewer. *Ib.*
6. MUNICIPAL CORPORATIONS: POWER TO IMPOSE PENALTIES: SPECIAL TAX BILL. Municipal corporations have power to prescribe reasonable penalties for neglect or refusal to discharge any duty imposed upon a citizen by ordinance. On this principle a charter provision is held valid which allows the holder of a special tax bill fifteen per cent per annum if payment be not made within six months after demand. *Ib.*

DRAMSHOPS IN ST. LOUIS. See *The State ex rel. Troll v. Hudson*, 302.

#### SCHOOLS.

1. DIVISION OF SCHOOL DISTRICT, LYING IN TWO OR MORE COUNTIES. Section 7027, Revised Statutes 1879, provides that a school district lying within two or more counties may be divided, where a majority of the qualified voters residing in the fractional portion of such district within either county, desire to attach themselves to an adjoining district within their own county, or to form a separate district. *Held*, that a vote of such qualified voters upon a proposition to withdraw from that part of the district lying outside their own county was ineffectual to divide such district, when no vote was taken to unite with an adjoining district, or to form a separate district. *Shattuck v. Phillips*, 80.

2. **MISCONDUCT OF TEACHER: REMEDY AGAINST HIM.** Under the present law the board of directors of a public school district have no power to discharge a teacher for cruel treatment and profane and abusive language used toward pupils. The law gives the county school commissioner power to revoke his certificate for "incompetency or immorality proven," and when this is done he is disqualified from further teaching in the public schools of that county. Such treatment and language used toward pupils fall within the definition of "incompetency or immorality;" and the remedy is through action by the commissioner. *HOUGH, C. J., and HENRY, J., dissented. Arnold v. School District, 226.*
3. **SCHOOL TAX: RAILROADS.** The road-bed of a railroad is chiefly valuable as an entirety, and its subdivisions within the limits of a county, or a school district, are not to be treated as local property under the acts of 1875 for the assessment and distribution of railroad taxes. Acts 1875, p. 121, § 8; p. 129, § 12. The school taxes on such road-bed, apportioned to a county, are properly distributed to the school districts therein in the proportion that the number of school children in each district bears to the whole number in the county; and the act of 1875 providing for such distribution is not unconstitutional, as giving a portion of the taxes levied upon property in one district to another. *Wells v. City of Weston, 22 Mo. 337, distinguished. In the Matter of the Apportionment of Taxes, 596.*

## SET-OFF.

1. **NEGOTIABLE PAPER: TRANSFER AFTER MATURITY: COUNTER-CLAIM: OFFSET.** In this State, when a negotiable note is indorsed or transferred after maturity, the right of offset or counter-claim on an independent contract does not follow it in the hands of the assignee. We adhere to the English rule that only such equities follow it as arise out of or inhere in it, and that the assignee takes it divested of all rights and claims arising out of independent transactions. See *Cutler v. Cook, 77 Mo. 388. Barnes v. McMullins, 260.*
2. **EFFECT OF TENDER.** A plea of set-off accompanied by a deposit in court, as a tender, of the amount of the difference between plaintiff's demand and the set-off claimed, is a conclusive admission of the justness of plaintiff's demand, and will entitle the plaintiff to recover the amount of his demand, less such sum, if any, as the jury may find to be due from him to the defendant on the set-off. *Williamson v. Baley, 636.*

## SIGNIFICATION OF TERMS.

- "ALL MY WORLDLY GOODS." See *Farish v. Cook, 212.*
- "INSOLVENCY." See *Bassett v. Elliott's Adm'r, 625.*
- "STATE AGENT." See *Stone v. The Travelers Insurance Company, 655.*

## SPECIAL JUDGE.

SEE COURTS.

## SPECIAL TAX BILLS.

1. **SPECIAL TAX BILL : SUIT AGAINST RECORD OWNER : SALE PASSES TITLE OF TRUE OWNER.** Where the statute under which a special tax bill was issued required the suit for its enforcement to be brought against "the owner" of the land to be charged; *Held*, that in the absence of any knowledge or notice to the contrary, the holder of the bill had the right to assume that the person in whom the records showed the title to be vested, was the true owner, and to sue accordingly; and that a sale under execution upon a judgment against the record owner passed the title as against the grantee in an unrecorded deed from him, provided the purchaser had no notice of the unrecorded deed. *Vance v. Corrigan*, 94.
2. **LOCAL LAWS CHANGING THE RULES OF EVIDENCE : SPECIAL TAX BILL.** The prohibition in the constitution against the general assembly passing any special or local law "changing the rules of evidence in any judicial proceeding," relates only to proceedings pending when the change is made. A city charter which makes special tax bills *prima facie* evidence of liability is not in conflict with this section, so far as respects bills issued after the enactment of the charter. *Eyerman v. Blaksley*, 145.
3. **LOCAL ASSESSMENTS : DUE PROCESS.** Local assessments for sewers and other public improvements may be made without violating the constitutional provision that no person shall be deprived of life, liberty or property without due process of law. *Ib.*
4. **MUNICIPAL CORPORATIONS : POWER TO IMPOSE PENALTIES : SPECIAL TAX BILL.** Municipal corporations have power to prescribe reasonable penalties for neglect or refusal to discharge any duty imposed upon a citizen by ordinance. On this principle a charter provision is held valid which allows the holder of a special tax bill fifteen per cent per annum if payment be not made within six months after demand. *Ib.*

## SPECIFIC PERFORMANCE.

**PROMISE TO GIVE LAND.** A promise to give land, whether written or verbal, will not be enforced upon the mere proof thereof; but where the promisee, induced by and relying upon such promise, has entered into possession and made improvements, has incurred obligations and expended money for and on account of such land, and has thereby changed his condition in life, equity will compel performance of the promise which, in such case, is regarded as no longer voluntary, but as founded on a valuable consideration, and, although verbal, as not within the statute of frauds. *West v. Bundy*, 407.

## STATUTES.

1. THE COMMON LAW: ANCIENT ENGLISH STATUTES. Independent of statutory enactment, it is the established doctrine that English statutes passed before the emigration of our ancestors applicable to our situation, and in amendment of the law, constitute a part of the common law of this country. *Baker v. Crandall*, 584.
2. CONSTRUCTION OF STATUTES. In the construction of statutes the intention of the legislature is to be ascertained from the language used, and not from general inferences to be drawn from the nature of the objects dealt with. *The State v. Hays*, 600.
3. STATUTE LAWS OF SISTER STATES: COMMON LAW. Judicial notice will not be taken of the statutes of a sister state; and it will not be presumed that the common law is in force in the state of Louisiana. *Sloan v. Torrey*, 623.

RETROSPECTIVE OPERATION. See *The State ex rel. Haussler v. Greer*, 188.

## STATUTES CONSTRUED.

## REVISED STATUTES OF 1879.

- Section 90, see page 549.  
 Section 95, see page 549.  
 Section 96, see page 584.  
 Section 97, see page 585.  
 Section 111, see page 477.  
 Sections 146, 152, 153, 154, see page 527.  
 Section 184, see page 527.  
 Section 354, see page 485.  
 Sections 539, 543, 547, see page 277.  
 Section 601, see page 352.  
 Section 661, see page 494.  
 Section 669, see page 326.  
 Section 670, see page 326.  
 Section 693, see page 97.  
 Section 743, see page 486.  
 Section 809, see pages 91, 286, 362, 534, 617, 639.  
 Section 990, see page 577.  
 Section 1010, see page 577.  
 Section 1011, see page 577.  
 Section 1041, see page 356.  
 Section 1250, see page 77.  
 Section 1326, see page 604.  
 Section 1399, see page 49.  
 Section 1548, see page 638.  
 Section 1652, see page 375.  
 Section 1654, see page 644.  
 Section 1686, see page 50.  
 Section 1707, see page 368.  
 Section 1798, see page 600.  
 Section 1897, see page 234.  
 Section 1908, see page 253.  
 Section 1910, see pages 307, 601.  
 Section 1918, see page 368.  
 Section 2096, see page 105.  
 Section 2161, see page 55.  
 Section 2165, see page 55.  
 Section 2502, see page 240.  
 Section 2722, see page 480.  
 Section 2858, see page 659.  
 Section 3117, see page 587.  
 Section 3126, see page 365.  
 Section 3140, see page 185.  
 Section 3466, see page 322.  
 Section 3468, see page 320.  
 Section 3481, see page 658.  
 Section 3483, see page 173.  
 Section 3519, see pages 176, 183.  
 Section 3522, see page 201.  
 Section 3546, see page 476.  
 Section 3636, see page 225.  
 Section 3736, see page 179.  
 Section 3741, see page 179.  
 Section 3775, see page 477.  
 Section 3808, see page 270.  
 Section 5441, see page 305.  
 Section 6013, see page 655.  
 Section 6732, see page 164.  
 Section 6857, see page 161.  
 Section 6858, see page 164.  
 Section 6859, see page 161.  
 Section 6847, see page 165.  
 Section 7027, see page 80.  
 Section 7046, see page 232.  
 Section 7083, see page 232.

## WAGNER'S STATUTES, 1872.

- Page 95, §§ 11, 12, 13, 14, 15, 16, see page 527.  
 Page 218, 20, see page 14.  
 Page 270, 9, see page 67.  
 Page 310, 38, see page 579.  
 Page 459, 41, see page 600.  
 Page 490, 7, see page 105.  
 Page 520, 12, 3, 4, see page 201.  
 Page 549, 2, see pages 137, 629.  
 Page 551, 27, see page 137.  
 Page 598, 50, see page 14.  
 Page 554, 12, see page 101.  
 Page 579, 13, see page 348.  
 Page 909, 5, see page 668.  
 Page 935, 14, see page 87.  
 Page 954, 3, see page 182.

Page 963, § 1, see page 80.  
 Page 1001, § 8, see page 320.  
 Page 1062, § 26, see page 430.  
 Page 1243, § 7, see page 230.  
 Page 1321, § 45, see page 88.  
 Page 1252, § 47, see page 230.  
 Page 1253, § 51, 53, 54, see page 231.  
 Page 1355, § 1, 2, 3, 4, see page 260.  
 Page 1369, § 36, 38, 40, see page 30.  
 Page 1372, § 1, see page 31.

## GENERAL STATUTES, 1865.

Page 258, § 6, see page 230.  
 Page 260, § 12, see page 230.  
 Page 326, § 1, see page 347.  
 Page 450, § 5, see page 649.  
 Page 491, § 29, 30, see page 247.  
 Page 783, § 1, see page 313.  
 Page 823, § 1, see page 313.

## REVISED STATUTES, 1855.

Page 873, § 14, see page 60.  
 Page 1018, § 7, see page 324.  
 Page 1290, § 26, see page 426.

## ACTS OF 1883.

Page 86, § 3, see page 302.

## ACTS OF 1879.

Page 82, § 11, see page 358.

## ACTS OF 1877.

Page 217, § 1, see page 280.  
 Page 281, § 1, see page 101.  
 Page 357, § 1, see page 267.  
 Page 395, § 7, see page 400.

## ACTS OF 1875.

Page 29, § 1, see page 89.  
 Page 121, § 8, see page 506.  
 Page 127, § 4, see page 576.  
 Page 129, § 12, see page 506.  
 Page 217, § 31, see page 667.  
 Page 218, § 1, see page 667.  
 Page 219, § 3, 5, 8, see pages 665, 667.  
 Page 220, § 9, see page 665.  
 Page 241, § 76, see page 666.

## ACTS OF 1873.

Page 100, § 2, see page 600.

## ACTS OF 1870.

Page 343, et seq., see page 96.

## ACTS OF 1857.

Page 364, § 5, see page 90.

## STATUTE OF FRAUDS.

1. **STATUTE OF FRAUDS: VERBAL AGREEMENT: WHOLLY EXECUTED ON ONE SIDE.** By an instrument of writing C. leased of W. a store-house in the town of Trenton, for a term of three years, from November 2nd, 1874. In December, 1876, while C. was in possession of the premises it was verbally agreed between the parties that W. should fit up the basement of the house for a carpet room, and that C. in consideration of this improvement, should pay W. \$100, and continue the lease of the store for two years after the expiration of the written lease. W. made the improvement agreed upon and C. entered into the possession of the new room and paid the \$100. *Held*, that the verbal agreement constituted a valid lease of the property for a period of two years from November 2nd, 1877: that it was not void under the Statute of Frauds, for want of a writing, because it was wholly executed by W. in the completion of the improvement agreed upon. The fact that there remained on W.'s part the duty to permit C. to enjoy the premises for the period of two years does not bring the agreement within the statute. *Winters v. Cherry*, 344.
2. ——— : ——— : **TO BE EXECUTED WITHIN ONE YEAR.** A verbal agreement, made in December, 1876, for a lease of property, during the month of November, 1877, is to be executed within one year, and hence is not void under the Statute of Frauds. *Ib.*
3. **INCOMPLETE MEMORANDUM OF CONTRACT: PAROL EVIDENCE.** A memorandum offered in evidence was as follows:  
 "MESSRS. PARLIN & ORENDORFF:  
*Gentlemen:* Please execute the following order for plows, culti-



vators, \* \* etc., to be delivered on board cars in Chillicothe, Missouri, marked for J. F. Lash:

QUANTITY.	OLD GROUND PLOWS, IRON-BEAM.	PRICE.
2.	No. 6. 14-inch cut, medium steel landside.....	\$22 00
3.	No 7. Extra. 16-inch cut, medium steel landside, three-horse.....	22 00

(and other items of plows in detail.)

CULTIVATORS.

50.	Iron-beam, Parlin's patent, with shields.....	14 50
19.	Wood-beam, Parlin's patent, with shields.....	13 50

For which I agree to give you my notes payable with exchange, or by express, prepaid, at above list, for plows—less forty-five per cent, and payable all January 1st, 1879, with ten per cent interest. Cultivators, less net per cent, and payable January 1st, 1879, with ten per cent interest.

PARLIN & ORENDORFF,  
Per TAYLOR."

*Held*, that though not a complete and perfect contract, this was a sufficient memorandum of a contract between J. F. Lash and Parlin & Orendorff, so as to be admissible in evidence in an action by the former against the latter; and that parol evidence was admissible to explain and apply it to the contract actually existing between the parties. *Lash v. Parlin*, 391.

4. WHEN a written memorandum of a contract does not purport to be a complete expression of the entire contract or part of it only is reduced to writing, the matter thus omitted may be supplied by parol evidence. *Ib.*
5. PROMISE TO GIVE LAND. A promise to give land, whether written or verbal, will not be enforced upon the mere proof thereof; but where the promisee, induced by and relying upon such promise, has entered into possession and made improvements, has incurred obligations and expended money for and on account of such land, and has thereby changed his condition in life, equity will compel performance of the promise which, in such case, is regarded as no longer voluntary, but as founded on a valuable consideration, and, although verbal, as not within the statute of frauds. *West v. Bundy*, 407.
6. PART PERFORMANCE. Taking possession of land under a verbal contract of purchase, reception of the products thereof, and payment of part of the purchase money, constitute a sufficient part performance to take the transaction out of the statute of frauds. *Adair v. Adair*, 630.

STOCKHOLDERS.

SEE CORPORATION.

SWAMP LANDS.

PATENT DOES NOT RELATE BACK, WHEN. A patent from the United States to the State of Missouri under the act of congress of September 28th, 1850, does not relate back to and become operative from the date of said act, so as to annul the title of a purchaser under an

entry and patent subsequent to said act, but prior to any selection or designation of such land as swamp land by the Secretary of the Interior. *Prior v. Lambeth*, 538.

### TAXES.

1. **COLLECTION OF DELINQUENT TAXES IN ST. LOUIS COUNTY.** The sheriff of St. Louis county is in virtue of his office required to collect the revenue, but, when he does so, he does not act as sheriff. In a suit brought by him in his capacity of collector, and to his use as such, it was *held* that the process was properly served by him, as sheriff, and that, under an execution issued upon the judgment in his favor as collector, he properly sold the land and made the deed as sheriff; that, as sheriff, he was not a party to the suit for taxes, and that, as collector, his interest therein was not such as to disqualify him from acting in his capacity as sheriff. *Webster v. Smith*, 163.
2. **DRAMSHOP LICENSES: POLICE POWER: TAXING POWER.** The license fee exacted by the general law regulating dramshops and the amendatory act of March 24th, 1883, (Sess. Acts 1883, p. 86, § 3,) is not a tax. It is a price paid for the privilege of carrying on a business which is detrimental to public morals and which the legislature, in the exercise of the police power, has the right to prohibit altogether. The act, therefore, is not void because it does not conform to the restrictions of sections 1, 3 and 10 of article 10 of the constitution in relation to the exercise of the taxing power. *The State ex rel. Troll v. Hudson*, 302.
3. **TAXES: INJUNCTION AGAINST COLLECTION.** A petition to restrain the collection of taxes on the ground of excessive valuation showed that the plaintiff, believing all his property to be exempt from taxation, delivered no list to the assessor; but it did not show that the assessor failed to demand a list. *Held*, that it stated no ground for relief. *Meyer v. Rosenblatt*, 495.
4. **PAYMENT OF OTHER TAX NO DEFENSE.** Payment of taxes on a different stock of goods as a merchant during a given fiscal year, is no defense to an action for the tax of a merchant legally imposed upon a stock of wares and merchandise which he had been engaged in selling as a merchant on the 1st day of January of that year, and for three months preceding that day. *The City of Kansas v. Johnson*, 661.
5. **JUDGMENT FOR MORE THAN DEMANDED.** The amount of tax due at the time of beginning suit being stated, the law fixes the interest and costs to be added when judgment is rendered. Hence, it is no objection to a judgment for taxes that it is for a greater amount than is sued for, the amount being in such case a matter of law and not of fact. *Ib.*
6. **THE EXERCISE OF THE TAXING POWER.** Section 3 of article 10 of the constitution, which declares that all taxes shall be levied by general laws was intended to restrict the power of the legislature in passing laws for the levy of taxes to the passage of general laws as

distinguished from local and special laws, and it did not repeal charter provisions authorizing the levy of taxes. *Ib.*

SCHOOL TAXES ON RAILROAD PROPERTY. See In the Matter of the Apportionment of Taxes, 596.

### TEMPORARY JUDGE.

SEE COURTS.

### TENDER.

EFFECT OF TENDER. A plea of set-off accompanied by a deposit in court, as a tender, of the amount of the difference between plaintiff's demand and the set-off claimed, is a conclusive admission of the justness of plaintiff's demand, and will entitle the plaintiff to recover the amount of his demand, less such sum, if any, as the jury may find to be due from him to the defendant on the set-off. *Williamson v. Baley*, 636.

### TORT.

1. RECEIVER: HIS LIABILITY FOR TORTS. An action may be maintained against the receiver of a corporation for a tort committed by the corporation before his appointment. The judgment, if for the plaintiff, will be against him in his capacity as receiver, and is leviable out of the assets in his hands. *Combs v. Smith*, 32.
2. NON-SURVIVAL OF ACTION FOR PERSONAL INJURIES. An action for injuries to the person does not survive as against the executor of the wrong-doer. *Stanley v. Bircher*, 245.
3. INN-KEEPER: ACTION FOR INJURY TO GUEST. The obligation resting upon an inn-keeper to keep his guest safe, is one imposed by law and not growing out of contract, and for violation of it the action is an action on the case for the injury sustained, and not an action for breach of contract. *Ib.*

### TOWNSHIP ORGANIZATION.

PLEADING CRIMINAL: TOWNSHIP ORGANIZATION. An indictment against a township officer must aver that the county has adopted township organization. This is a thing of which the courts will not take judicial cognizance, and proof of it will not be received without a proper averment. *The State v. Hays*, 600.

### TRESPASS.

1. INJUNCTION AGAINST TRESPASS. To maintain injunction against trespass upon property real or personal, it is not necessary that the defendant should be insolvent or the wrong irreparable. The statute

gives the right wherever an adequate remedy cannot be afforded by an action for damages. R.S., § 2722. Thus where the owners of a steamboat were in the constant habit of discharging freight at a private wharf, without the consent and against the protest of the owner of the wharf, thereby seriously interfering with his business of sawing, receiving and delivering lumber and ties, and they threatened to continue this practice; *Held*, that the wharf owner might maintain injunction. *Turner v. Stewart*, 480.

2. **TRESPASS ON REALTY: JURISDICTION: ADMIRALTY.** The State courts have jurisdiction of all trespasses committed upon real estate within the limits of the State. The fact that the real estate in question is a wharf does not make it a matter of admiralty jurisdiction and so cognizable alone in the courts of the United States. *Ib.*

#### TRUSTS AND TRUSTEES.

**EXECUTION CREDITOR AFTER LEVY, A TRUSTEE.** See *Lower v. Buchanan Bank*, 67

#### UNITED STATES LIQUOR LICENSE.

SEE DRAMSHOPS.

#### VENDOR AND VENDEE.

1. **PURCHASE OF ADVERSE TITLE.** A vendee may buy up a title antagonistic to that of his vendor, and set it up to defeat that of his vendor or his vendor's representatives. *Funkhouser v. Lay*, 458.
2. **ESTOPPEL.** A purchaser at executor's sale cannot at the same time claim under the sale and also plead that the sale was not made in accordance with the order of court. *Adair v. Adair*, 630.

#### VENDOR'S LIEN.

1. **IN A SUIT** to enforce a vendor's lien, fraud on the part of the plaintiff inducing the purchase, was set up in the answer, which prayed the rescission of the contract, the sale of the land and the application of the proceeds to the re-imbursement of defendant for such part of the purchase money and of the taxes as he had paid. The issues of fraud and consequent damages were submitted to a jury who found for defendant, and assessed the damages. The court thereupon entered a decree for the satisfaction of defendant's note for the unpaid purchase money, that plaintiff retain the moneys received by him, that defendant retain possession of the land, and that the title to the same be vested in him. *Held*, that such decree should not be permitted to stand, being made without reference to the pleadings or proofs. *Baldwin v. Whaley*, 186.
2. **VENDOR'S LIEN: STATUTE OF LIMITATIONS.** Where the vendor has delivered possession to the vendee, but retains the legal title under

a contract to deliver a deed when the purchase money is fully paid, the holding of the vendee will not be deemed adverse, and the statute of limitations will not begin to run in his favor until he has made full payment. *Adair v. Adair*, 630.

#### VOLENTI NON FIT INJURIA.

THE MAXIM APPLIED IN A CIVIL ACTION FOR RAPE. See *Robinson v. Musser*, 153.

#### WAIVER.

— OF IRREGULARITIES IN PRACTICE. See *Carter v. Prior*, 222; *Meador v. Malcolm*, 550; *Baker v. Crandall*, 584.

— OF LIMITATION. See *Adair v. Adair*, 630.

— BY ACCUSED OF HIS RIGHT TO CONFRONT ADVERSE WITNESSES. See *The State v. Wagner*, 644.

#### WATER AND WATER COURSES.

1. WATER-COURSE. The ordinary flow of surface water does not constitute a water course. *Benson v. The Chicago & Alton Railroad Company*, 504.
2. DIVERSION OF WATER COURSES—OF SURFACE WATER. The authorities are generally agreed against the right of one proprietor to divert a natural water course, so as to throw the water upon an adjacent proprietor to his injury; and in this State the law seems to be settled that in respect even to surface water the dominant proprietor has no right, in diverting it, to obstruct its course by collecting it together, as in artificial ditches, and conduct it to and discharge it upon the servient land in increased volume. *Ib.*
3. MEASURE OF DAMAGES IN ACTION FOR FLOODING LAND. In an action on the case for flooding land the plaintiff can recover only the damages done up to the institution of the suit. It is, therefore, error to instruct the jury that the proper measure of damages is the difference between the market values of the land immediately before and immediately after the flooding took place. *Ib.*
4. RAILROADS: EASEMENT: FLOODING ADJACENT LAND. The grant of a right of way to a railroad company carries with it the right to make the necessary embankments, culverts and ditches, for the proper grade and protection of the road; and if in exercising this right with due care and skill the flow of surface water from adjoining land of the grantors is obstructed, it is *damnum absque injuria*. *Ib.*

## WILLS.

1. **PROOF OF EXECUTION.** The evidence offered in support of a paper propounded as a will showed that it was written in a language not understood by the supposed testatrix; that the witnesses attested not at her request, but at the request of one of the legatees; and that she neither said nor did anything, nor was anything said or done in her presence, which indicated that she knew she was making a will. *Held*, that the execution of the paper as a will was not proven. *Milttenberger v. Milttenberger*, 27.
2. ———: **WITNESSES.** A legatee whose interest as such in the establishment of a will still continues, will not be allowed to testify to its due execution, notwithstanding he may not have signed as an attesting witness. The statute only disqualifies him in express terms in the case in which he has so signed, but it would defeat the manifest policy of the statute to allow him to testify when he has not so signed. *Ib.*
3. **ABSOLUTE POWER OF DISPOSAL CONFERRED BY WILL: EXECUTORY DEVISE.** A will was as follows: "I give and bequeath to my only child, Rachel \* \* \* all my property, real, personal and mixed, \* \* \* wishing my said daughter to have, use and dispose of the same absolutely in any way that may seem to her best, \* \* \* it being the intention of this, my last will and testament, that my said daughter shall have and dispose of all my said property in her own right as absolute owner \* \* \* and that the same, and its proceeds and increase, if not disposed of and expended by her in her lifetime, shall descend at her death to her children \* \* \* ; but if the said Rachel should die leaving no children nor their descendants, and without having disposed of said property, it is then my will that out of what may remain undisposed of by her," certain specified legacies should be paid. *Held*, 1st, that the will vested in the daughter of the testatrix an absolute and unlimited estate; 2nd, that the absolute power of disposal vested in the daughter included the power to dispose of the property by will as well as by deed; 3rd, that the limitation over to the legatees was void as an executory devise being inconsistent with the absolute power of disposal vested in the daughter. *Wead v. Gray*, 59.
4. **RELEASE: MERGER.** Where there were several notes secured by successive deeds of trust on the same land, and two of the notes were devised to the owner of the equity of redemption; *Held*, that although the technical doctrine of merger had no application, yet in the absence of any evidence that the devisee had kept the two notes alive, the devise would be treated as a release and cancellation of them. *Ib.*
5. **A WILL CONSTRUED: "ALL MY WORLDLY GOODS."** A will ran thus: "I give and bequeath to my beloved wife all my worldly goods, consisting of household furniture, clothing, beds and bedding, money and cattle, also whatever debts may be due me, likewise my house and lot, \* \* \* to be by her enjoyed during her life, and at her death to belong to the child with which she is now pregnant, if it should survive her, if not, then the said house and lot to be vested absolutely in her." In addition to the house and lot, the testator,



both at the time of making the will and at his death, owned other real estate. *Held*, that it could not pass by the designation "all my worldly goods," and as it was not specifically mentioned or otherwise referred to, as to it the testator died intestate. *Farish v. Cook*, 212.

6. **PRESUMPTION AGAINST INTESTACY.** It is a natural presumption that a testator, in making his will, intended to dispose of his whole estate and not to die intestate as to any part of it, and in construing doubtful expressions this presumption ought to have weight, but it cannot supply the actual intent of the testator to be derived from the language of the will. When the clause to be construed cannot be connected with some other part of the will disclosing such intent, it cannot prevail, nor even where the intent is disclosed, in the absence of language sufficient to carry everything. *Ib.*
7. **IN CONSTRUING A WILL,** the testator's intention governs, and that construction should be given which prevents a failure of the gift. *Crelius v. Horst*, 566.
8. **DEVISE.** A devise to a class, though as tenants in common, will not lapse by the death of one of the devisees before the testator, but the survivors take the whole. *Ib.*

#### WITNESSES.

1. **PROOF OF EXECUTION: WITNESSES.** A legatee whose interest as such in the establishment of a will still continues, will not be allowed to testify to its due execution, notwithstanding he may not have signed as an attesting witness. The statute only disqualifies him in express terms in the case in which he has so signed, but it would defeat the manifest policy of the statute to allow him to testify when he has not so signed. *Millenberger v. Millenberger*, 27.
2. **ARBITRATORS.** An arbitrator is not a competent witness to impeach his own award. *Ellison v. Weathers*, 115.

**OPINIONS OF WITNESSES.** See *The State v. Burgess*, 234.